TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 750. 76

ANK F. GRAHAM AND THE TITLE GUARANTY AND SURETY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED JULY 20, 1911.

(22,826.)

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UNITED STATES OF AMERICA,
Fourth Circuit, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, Begun and Held at the Court House, in the City of Richmond, on the First Tuesday in May, Being the Second Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Eleven.

Present:

Hon. J. C. Pritchard, Circuit Judge.
Hon. Alston G. Dayton, District Judge.
Hon. Henry G. Connor, District Judge.

Among other were the following proceedings, to-wit:—

No. 1014.

FRANK F. GRAHAM and THE TITLE GUARANTY AND SURETY COMPANY, a Body Corporate, Plaintiffs in Error,

versus

UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

Be it remembered that heretofore, to-wit, on the 23rd day of November, 1910, transcript of the record of the said Circuit Court in the said entitled cause, was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows, to-wit:—

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, } TO-WIT:

At a Circuit Court of the United States in and for the Maryland District, begun and held at the City of Baltimore, on the first Monday in April, (being the fourth day of the same month in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable Thomas J. Morris, Judge Maryland District; John C. Rose, Esq., Attorney; John F. Langhammer, Esq., Marshal; Arthur L. Spamer, Clerk.

MEMO. The Honorable John C. Rose qualified as District Judge on the 16th day of April, 1910, and was succeeded as United States Attorney, by John Philip Hill, Esq., who qualified on the same day, being fifteen days after the beginning of the above mentioned term of court.

Among others were the following proceedings, to-wit:

United States of America *vs.* Frank F. Graham and Title Guaranty and Surety Company, a body corporate.	At Law.

DECLARATION.

(2) Filed October 14, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America *vs.* Frank F. Graham and Title Guaranty and Surety Company, a body corporate.

The United States of America, by John C. Rose and Morris A. Soper, its attorneys, sues Frank F. Graham and the

Title Guaranty and Surety Company, a corporation duly incorporated under the laws of the State of Pennsylvania;

For that on the 13th day of October, in the year 1906, the said Frank F. Graham did make a proposal to the plaintiff to cut and deliver certain Bethel white granite from Vermont for the south pavilion of the new building for the National Museum, in the City of Washington, District of Columbia, in response to a certain advertisement theretofore published by a certain Bernard R. Green, Superintendent of Construction of said building, requesting proposals for said purpose.

That afterwards, to-wit, on the 23rd day of October, 1906, the said Frank F. Graham did enter into a contract with the said Bernard R. Green, Superintendent of Construction as aforesaid, under the direction of the Regents of the Smithsonian Institution for and on behalf of the United States of America, whereby the said Frank F. Graham did covenant and agree, in conformity with the said advertisement and with the specifications, instructions and general conditions attached to the said written contract, to transport from the quarry, cut, box and deliver complete, all of the Bethel granite to be furnished by the plaintiff free on board cars at the quarry at (3) Bethel, Vermont, required for that portion of the south pavilion above the first floor level of the said building for the National Museum, in Washington, District of Columbia, described as part "C" in the said specifications, and to do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions, all for the gross sum of one hundred and forty-nine thousand dollars ($149,000.00), to be paid to him in lawful money of the United States from time to time as the progress of the work might warrant, a percentage of ten per centum to be reserved from each payment until the whole contract should be performed; in which contract it was provided that if, in the judgment of the Superintendent of Construction, the said Frank F. Graham, should fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the said contract, then the said Superintendent of Construction, or his successor legally appointed, should have power, with the sanction of the Regents of the Smithsonian Institution, to annul the said contract by giving notice in writing to that effect to the said Frank F. Graham, and that upon the giving of such notice all payments to the parties of the second part under the said contract should cease, and all money or reserved percentage due or to become due to the said Frank F. Graham by reason of the said contract should be retained by the said Superintendent of Construction until the final completion and acceptance of the work in said contract stipulated to

be done, and that the plaintiff should have the right to recover from the said Frank F. Graham whatever sums might be expended by the said Superintendent of Construction in completing the contract in excess of the price stipulated to be paid to the said Frank F. Graham for completing the same, and also all costs of inspection and superintendence incurred by the plaintiff in excess of those payable by the plaintiff during the period allowed in said contract for the completion thereof by the said Frank F. Graham, and the said Superintendent of

(4) Construction might deduct all the above mentioned sums out of or from the money or reserved percentage retained as aforesaid, and that upon the giving of notice, said Superintendent of Construction should be authorized to proceed to secure the performance of the work or delivery of the material by contract or otherwise in accordance with law.

And that on the said 26th day of October, in the year 1906, the said Frank F. Graham, as principal, and the said Title Guaranty and Surety Company, as surety, did make a certain writing obligatory, sealed with their seals, and therein acknowledged themselves to be held and bound unto the plaintiff in the penal sum of fifty thousand dollars ($50,000.00), for the payment of which sum they bound themselves, their heirs, executors, administrators and successors, jointly and severally. The condition of the said obligation was such that if the said Frank F. Graham should and would in all respects duly and fully observe and perform all and singular, the covenants, conditions and agreements in and by the said contract agreed and covenanted by the said Frank F. Graham to be observed and performed, according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that might be granted on the part of the plaintiff as during the original term of the same, and should promptly make full payments to all persons supplying him with labor and materials for the prosecution of the work provided for in said contract, then the said obligation should be void and of no effect; otherwise to remain in full force and virtue.

And that the said Frank F. Graham did not duly and fully observe and perform all and singular, the covenants, conditions and agreements in and by the said contract agreed and covenanted by the said Frank F. Graham to be observed and performed according to the true intent and meaning of said contract.

(5) And for that on the 18th day of March, 1908, the said Frank F. Graham in the judgment of the said Superintendent of Construction, did fail and had failed to prosecute faithfully and diligently the work in accordance with the specifications and requirements of said contract, whereupon on the said 18th

day of March, 1908, the said Superintendent of Construction, with the sanction of the Regents of the Smithsonian Institution, did annul the said contract by giving notice in writing to that effect to the said Frank F. Graham, and thereupon the said Superintendent of Construction did proceed to secure the performance of the said work and the delivery of the said material, and was obliged to expend and did expend in completing the said contract in excess of the price stipulated in said contract to be paid to the said Frank F. Graham for completing the same the sum of fifty-six thousand and eighty dollars and seventy-five cents ($56,080.75), taking into account prior payments to the said Frank F. Graham during the progress of the work, and all moneys or reserved percentage retained as aforesaid.

And the plaintiff claims sixty thousand dollars ($60,000.00).

JOHN C. ROSE,
MORRIS A. SOPER,
Attorneys for plaintiff.

To the Defendants:

Take notice, that on the day of your appearance to this action in the Circuit Court of the United States for the District of Maryland, a rule will be laid upon you requiring you to plead to the above declaration on or before the 20th day of November, 1909.

JOHN C. ROSE,
MORRIS A. SOPER,
Attorneys for Plaintiff.

SUMMONS.

(6) Issued October 14, 1909.

THE UNITED STATES OF AMERICA,
District of Maryland, } to-wit:

The President of the United States of America to the Marshal for the Maryland District—Greeting:

We command you that you summon Frank F. Graham and the Title Guaranty and Surety Company, a corporation, if they be found in your district, to appear before the Judges of the Circuit Court of the United States of America for the Fourth Circuit in and for the District of Maryland, at the United States Court Room in the City of Baltimore, on the

first Monday of November next, to answer unto the action of the United States of America and how you shall execute this precept you make known to us in our Circuit Court for the District aforesaid, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 14th day of October in the year of our Lord one thousand nine hundred and nine.

Issued the 14th day of October, 1909.

[Seal of Court] ARTHUR L. SPAMER, Clerk.

MARSHAL'S RETURN ENDORSED ON ABOVE SUBPOENA.

"Summoned Frank F. Graham, personally, and copy declaration left with him, October 18, 1909.

Summoned the Title Guaranty & Surety Company, by service on Howard S. Kroh, a member of the firm of McComas & Kroh, its agents, and copy declaration left with him, October 18, 1909.

JOHN F. LANGHAMMER,
U. S. Marshal."

APPEARANCE FOR TITLE GUARANTY & SURETY COMPANY.

(7) Filed November 5, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs.
Frank F. Graham
and
Title Guaranty and Surety Company, a body corporate.

Mr. Clerk:

Please enter my appearance for the Title Guaranty and Surety Company, one of the defendants in the above entitled case.

CHARLES F. HARLEY,
Attorney for the Title Guaranty and Surety Company, one of the defendants in the above entitled case.

APPEARANCE FOR FRANK F. GRAHAM.

(8) Filed November 9, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs
Frank F. Graham, et al. } No. Dkt.

Mr. Clerk:

Enter my appearance as attorney for the defendant, Frank F. Graham, in the above entitled case.

GEORGE R. GAITHER.

PLEAS OF FRANK F. GRAHAM.

(9) Filed November 17, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs.
Frank F. Graham, and The Title Guaranty and Surety Company, a body corporate, Defendants.

The defendant, Frank F. Graham, by George R. Gaither and Garnett Y. Clark, his attorneys, for pleas to the declaration filed against him by the plaintiff in this cause, says:

For a first plea that the said Superintendent of Construction did not with the sanction of the Regents of the Smithsonian Institution on the said 18th day of March, 1908, annul the said agreement by giving notice in writing to that effect to the defendant.

And for a second plea this defendant says that said Superintendent of Construction did not obtain the sanction of the Regents of the Smithsonian Institution to annul the said agreement on or prior to the said 18th day of March, 1908.

And for a third plea this defendant says that the said Bernard R. Green, was the official in the entire charge of the work of constructing said building referred to in said dec-

laration, and that the said Green in his own name and under his own signature and seal made the contract referred to, and all other contracts regarding the erection of said building. That in pursuance of his said position in charge of said building that said Green was familiar with all the facts regarding the building of the same and the contracts made with reference thereto. That by the terms of the agreement enterd into by the said Green with this said defendant all granite referred to (10) in said agreement was to be furnished to this defendant in net dimension blocks, one block for each pattern, and the same to be furnished without unnecessary delay and without charge, free on board cars at the Quarry at Bethel, Vermont. That by the terms of the said agreement it was further provided that the confractor should prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work, and that said plans should be submitted to the Superintendent of Construction not less than one month prior to the commencement of the work on the cutting of the stones which they represented, so as to give ample time for examination and approval, and that the setting plans for the lower courses of the basement story (the first course to be cut) should be prepared and submitted immediately after the execution of the contract. And this defendant further says that said contract was entered into on October the 23rd, 1906, and that immediately thereafter this defendant submitted to the said Superintendent of Construction setting plans for the lower courses of the basement story, and that the same were approved by the said Superintendent of Construction, and that he subsequently sent to the said Superintendent of Construction the setting plans for all the stone work, covered by the said contract, and that the same were in the possession of the said Superintendent of Construction and approved by him for all of said granite work. That this defendant further to carry out the terms of his said contract spent over five thousand dollars ($5,000) in the equipment of his yard with the proper machinery and facilities for handling the said granite, and that the same was known to the said Superintendent of Construction.

And this defendant further says that, nevertheless, in violation of the terms of said agreement that said Superintendent of Construction from the time of the making of the said contract, on October 23, 1906, to the first day of May, 1907, only furnished to this said defendant one carload of granite, (11) which was shipped on January 17, 1907, and which contained 333 cubic feet of granite, and one carload on April 22, 1907, which contained 258 cubic feet. That during all of said period this defendant was anxious and ready to perform his said agreement, and that the same was known to the said

Superintendent of Construction. That during the month of May, 1907, the said Superintendent of Construction caused to be shipped to this defendant eight cars of said granite containing in the aggregate 1,650 cubic feet. That in the month of June the said Superintendent of Construction caused to be shipped to this defendant ten cars of said granite, containing in the aggregate 2,288 cubic feet. That during the month of July, 1907, the said Superintendent of Construction caused to be shipped to this defendant nineteen cars of said granite containing in the aggregate 4,191 cubic feet. That during the month of August, 1907, the said Superintendent of Construction cause to be shipped to this defendant five cars of said granite, containing in the aggregate 1,157 cubic feet, and that during the month of September, 1907, the said Superintendent of Construction caused to be shipped to this defendant eighteen cars of said granite containing in the aggregate 4,624 cubic feet, and this defendant says that the said Superintendent of Construction thus caused to be shipped to this said defendant during the period from the time of the making of said contract on October 23, 1906, to October 1st, 1907, the date on which said contract was agreed to be finished by the terms of said agreement, only 14,801 cubic feet of the granite required to be used under said agreement, although the total amount of the said granite required to be used and cut by this said defendant under said contract amounted to over 61,000 cubic feet, and this defendant says that by reasons of these great delays this defendant suffered great pecuniary loss and damage, and that the same was known to the said Superintendent of Construction; and that in addition thereto the greater portion of said granite so furnished was not in net dimension blocks as required by the terms of said agreement, and that in order to prepare the same for the purposes of said agreement that this said defend-
(12) ant was obliged to expend large sums of money in excess of the amount which would have been required had the said stone been delivered in proper net dimensions, and also to pay large sums for freight in excess on the same, and that the Superintendent of Construction was informed of said fact and knew the same to be true. And also that the said granite was not delivered free on board cars at the Quarry at Bethel, Vermont, but at some place near Bethel, Vermont, and that the rate of freight that this defendant was obliged to pay on account of shipment was in excess of the freight which would have been paid had the said granite been shipped from Bethel, Vermont, and that this fact was communicated and made known to the said Superintendent of Construction. That after the said first day of October, 1907, the said Superintendent of Construction caused to be shipped to this said defendant during the month of October, 1907, 20 cars of said granite, con-

taining in the aggregate 5,188 cubic feet. That during the month of November, 1907, the said Superintendent of Construction caused to be shipped to this defendant 33 cars containing in the aggregate 8,063 cubic feet. That during the month of December, 1907, the said Superintendent of Construction caused to be shipped to this defendant nineteen cars containining in the aggregate 4,798 cubic feet, and during the month of January, 1908, said Superintendent of Construction caused to be shipped to this defendant twenty-two cars, containing in the aggregate about 6,000 cubic feet. That during the month of February the said Superintendent of Construction caused to be shipped to this said defendant twelve cars, containing in the aggregate about 3,000 cubic feet.

And this defendant says that during the months of December, January and February, he, this said defendant remonstrated to the said Superintendent of Construction against the shipment of the said granite in the volume and manner in which the same was being shipped by said Superintendent. And this defendant further says that by the terms of the said agreement it was provided that payment should be made from time to time as the work progressed, and that the said Superintend-
(13) ent of Construction had an Inspector upon the premises of this said defendant during the period of said contract, who was entirely familiar with all the actions of the defendant, and from time to time informed the said Superintendent of Construction of the contentions as they existed. That during the early part of the month of March, 1908, on account of the manner in which the said granite had been shipped to him by the said Superintendent of Construction, this defendant states that his yards were so overcrowded that it was impossible for him to carry on the work of properly cutting the said granite, and that in addition thereto he had advanced thousands of dollars on account of the freight on said granite, and that in addition thereto he was then informed that additional cars had been shipped to him by the said Superintendent of Construction, and that the said cars would have to be unloaded by this defendant, and the freight paid on same or he would be subject to heavy charges for demurrage on said cars; that in addition thereto the greater portion of said granite as shipped to this defendant by the said Superintendent of Construction was not in net dimension blocks and that the expense of properly cutting the same had already been very heavy upon the said defendant, and that there would be an additional expenditure necessary on account of the stone already shipped; and that in addition thereto this stone had been shipped to this defendant during the time of the year in which it was very difficult on account of the weather to properly handle the same or cut it, owing to the exposure to the weather; and that in addition there-

to said Superintendent had failed to pay this said defendant for the work and advances made by him in the manner in which the contract required the same to be paid. And this defendant says that by reason of the failure to make said payments and on account of the facts herein stated this defendant stopped work temporarily at his yards upon the said granite on Saturday, March 7, 1908, and that this defendant thereupon informed the said Superintendent of Construction that he had (14) been obliged to stop said work, but that he would be glad to adjust the matter in any way which might be fair and equitable, and that it was on account of his financial losses, and the conditions above stated, which were known to the said Superintendent of Construction, that he had been obliged to stop said work. And this defendant says that the said Superintendent of Construction after said notice, and with knowledge of all the facts and circumstances herein set forth, and after the 16th day of March, 1908, undertook to annul the said contract as set forth in said declaration.

And the defendant says that by reasons of the matters and things herein stated that the said Benjamin R. Green, Superintendent of Construction did not act in good faith in seeking to annul said contract, and that the annulment of said contract by the said Superintendent of Construction is not valid and binding upon this defendant.

And for a fourth plea this defendant says that the said Barnard R. Green, was the official in the entire charge of the work of constructing said building referred to in said declaration, and that the said Green in his own name and under his own signature and seal made the contract referred to, and all other contracts regarding the erection of said building. That in pursuance of his said position in charge of said building that said Green was familiar with all the facts regarding the building of the same and the contracts made with reference thereto. That by the terms of the agreement entered into by the said Green with this said defendant all granite referred to in said agreement was to be furnished to this defendant in net dimension blocks, one block for each pattern, and the same to be furnished without unnecessary delay and without charge, free on board cars at the Quarry at Bethel, Vermont. That by the terms of the said agreement it was further provided that the contractor should prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work, and that said plans should be submitted to the Superintendent of Construction not less than one month prior to the (15) commencement of the work on the cutting of the stones which they represented, so as to give ample time for examination and approval, and that the setting plans for the lower courses of the basement story (the first course to be cut) should

be prepared and submitted immediately after the execution of the contract. And this defendant further says that said contract was entered into on October the 23rd, 1906, and that immediately thereafter this defendant submitted to the said Superintendent of Construction setting plans for the lower courses of the basement story, and that the same were approved by the said Superintendent of Construction, and that he subsequently sent to the said Superintendent of Construction the setting plans for all the stone work, covered by the said contract, and that the same were in the possession of the said Superintendent of Construction and approved by him for all of said granite work. That this defendant further to carry out the terms of his said contract spent over five thousand dollars ($5,000) in the equipment of his yard with the proper machinery and facilities for handling the said granite, and that the same was known to the said Superintendent of Construction.

And this defendant further says that, nevertheless, in violation of the terms of said agreement that said Superintendent of Construction from the time of the making of the said contract on October 23, 1906, to the first day of May, 1907, only furnished to this said defendant one carload of granite, which was shipped on January 17, 1907, and which contained 333 cubic feet of granite, and one carload on April 22, 1907, which contained 258 cubic feet. That during all of said period this defendant was anxious and ready to perform his said agreement, and that the same was known to the said Superintendent of Construction. That during the month of May, 1907, the said Superintendent of Construction caused to be shipped to this defendant eight cars of said granite containing the aggregate 1,650 cubic feet. That in the month of June the said (16) Superintendent of Construction caused to be shipped to this defendant ten cars of said granite, containing in the aggregate 2,288 cubic feet. That during the month of July, 1907, the said Superintendent of Construction caused to be shipped to this defendant nineteen cars of said granite containing in the aggregate 4,491 cubic feet. That during the month of August, 1907, the said Superintendent of Construction caused to be shipped to this defendant five cars of said granite, containing in the aggregate 1,157 cubic feet, and that during the month of September, 1907, the said Superintendent of Construction caused to be shipped to this defendant eighteen cars of said granite, containing in the aggregate 4,624 cubic feet, and this defendant says that the said Superintendent of Construction thus caused to be shipped to this said defendant during the period from the time of the making of said contract on October 23, 1906, to October 1st, 1907, the date on which said contract was agreed to be finished by the terms of said

agreement, only 14,801 cubic feet of the granite required to be used under said agreement, although the total amount of the said granite required to be used and cut by this said defendant under said contract amounted to over 61,000 cubic feet, and this defendant says that by reasons of these great delays this defendant suffered great pecuniary loss and damage, and that the same was known to the said Superintendent of Construction; and that in addition thereto the greater portion of said granite so furnished was not in net dimension blocks as required by the terms of said agreement, and that in order to prepare the same for the purposes of said agreement that this said defendant was obliged to expend large sums of money in excess of the amount which would have been required had the said stone been delivered in proper net dimensions, and also to pay large sums for freight in excess on the same, and that the Superintendent of Construction was informed of said fact and knew the same to be true. And also that the said granite was not delivered free on board cars at the Quarry at Bethel, Vermont, but at some place near Bethel, Vermont, and that the (47) rate of freight that this defendant was obliged to pay on account of shipment was in excess of the freight which would have been paid had the said granite been shipped from Bethel, Vermont, and that this fact was communicated and made known to the said Superintendent of Construction. That after the said first day of October, 1907, the said Superintendent of Construction caused to be shipped to this said defendant during the month of October, 1907, 20 cars of said granite, containing in the aggregate 5,188 cubic feet. That during the month of November, 1907, the said Superintendent of Construction caused to be shipped to this defendant 33 cars containing in the aggregate 8,063 cubic feet. That during the month of December, 1907, the said Superintendent of Construction caused to be shipped to this defendant nineteen cars containing in the aggregate 4,798 cubic feet, and during the month of January, 1908, said Superintendent of Construction caused to be shipped to this defendant twenty-two cars, containing in the aggregate about 6,000 cubic feet. That during the month of February the said Superintendent of Construction caused to be shipped to this said defendant twelve cars, containing in the aggregate about 3,000 cubic feet.

And this defendant says that during the months of December, January and February, he, this said defendant, remonstrated to the said Superintendent of Construction against the shipment of the said granite in the volume and manner in which the same was being shipped by said Superintendent. And this defendant further says that by the terms of the said agreement it was provided that payment should be made from time to time as the work progressed, and that the said Superin-

fendant of Construction had an Inspector upon the premises of this said defendant during the period of said contract, who was entirely familiar with all the actions of the defendant, and from time to time informed the said Superintendent of Construction of the contentions as they existed. That during the early part of the month of March, 1908, on account of the (18) manner in which the said granite had been shipped to him by the said Superintendent of Construction, this defendant states that his yards were so overcrowded that it was impossible for him to carry on the work of properly cutting the said granite, and that in addition thereto he had advanced thousands of dollars on account of the freight on said granite, and that in addition thereto he was then informed that additional cars had been shipped to him by the said Superintendent of Construction, and that the said cars would have to be unloaded by this defendant, and the freight paid on same, or he would be subject to heavy charges for demurrage on said cars; that in addition thereto the greater portion of said granite as shipped to this defendant by the said Superintendent of Construction was not in net dimension blocks and that the expense of properly cutting the same had already been very heavy upon this said defendant, and that there would be an additional expenditure necessary on account of the stone already shipped; and that in addition thereto this stone had been shipped to this defendant during the time of the year in which it was very difficult on account of the weather to properly handle the same or cut it, owing the exposure to the weather; and that in addition thereto said Superintendent had failed to pay this said defendant for the work and advances made by him in the manner in which the contract required the same to be paid. And this defendant says that by reason of the failure to make said payments and on account of the facts herein stated this defendant stopped work temporarily at his yards upon the said granite on Saturday, March 7, 1908, and that this defendant thereupon informed the said Superintendent of Construction that he had been obliged to stop said work, but that he would be glad to adjust the matter in any way which might be fair and equitable, and that it was on account of his financial losses, and the conditions above stated, which were known to the said Superintendent of Construction, that he had been obliged to stop said work. And this defendant says that the said Superintendent of Construction after said notice, and with knowledge of all the facts and circumstances herein set (19) forth, and after the 16th day of March, 1908, undertook to annul the said contract as set forth in said declaration.

And this defendant says that the said Bernard R. Green, Superintendent of Construction, did not communicate the above matters and things herein set forth to the Regents of

the Smithsonian Institution at the time when he obtained the alleged sanction of the Regents of the Smithsonian Institution to the annulment of the said agreement, as set forth in said declaration, and that in failing to give such information to the said Regents, said Superintendent of Construction did not act in good faith, and that the alleged annulment of said contract with the sanction of the said Regents is not valid and binding upon this defendant.

And for a fifth plea, this defendant says that the said alleged annulment of said contract on the eighteenth day of March, 1908, by the said Bernard R. Green, was the result of bad faith on the part of the said Bernard R. Green.

And for a sixth plea, this defendant says that the said alleged annulment of said contract was procured by the fraud of the said Bernard R. Green.

And for a seventh plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed.

And for an eighth plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed, in that the said plaintiff did not furnish to this defendant the necessary Bethel (20) granite in net dimension blocks.

And for a ninth plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed, in that the plaintiff did not furnish to this defendant the necessary Bethel granite, without unnecessary delay.

And for a tenth plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants, and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed, in that the said plaintiff did not furnish to this defendant the necessary Bethel granite without charge, free on board cars at the Quarry at Bethel, Vermont.

And for an eleventh plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed, in that

the said plaintiff did not furnish to this defendant the necessary Bethel granite.

And for a twelfth plea, this defendant says that the fulfillment, keeping and performance of the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on the part of this defendant to be fulfilled, kept and performed, was prevented by the acts of the plaintiff.

And for a thirteenth plea, this defendant says, that after the alleged annulment of said contract by the said Bernard R. Green, the expenditures of the plaintiff in completing said contract were not reasonable and fair.

And for a fourteenth plea, this defendant says that section four of said contract provides as follows:

(21)

"4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Superintendent of Construction, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor, legally appointed, shall have the power, with the sanction of the Regents of the Smithsonian Institution, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice, the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law."

And that Section Five of said contract provides as follows:
(22)

"5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: provided, however, that the party of the first part may, with the prior sanction of the Regents of the Smithsonian Institution, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract."

And that the acts of the plaintiff prevented this defendant from freighting, cutting, boxing, and delivering complete all of the Bethel granite required for part "C" of the pavilion, before October 1, 1907; and that the plaintiff, without taking any further action in the premises under said contract through its said Superintendent of Construction, Bernard R. Green, permitted this defendant, after knowing the work under
(23) said contract was not completed in time, to proceed on said work till March, 1908, and accepted said work from October 1, 1907, to March, 1908; and that thereby the plaintiff became and is disentitled to recover on said contract executed on the twenty-third day of October, 1906.

GEORGE R. GAITHER,
GARNETT Y. CLARK,
Attorneys for Frank F. Graham, one of the defendants.

PLEAS OF TITLE GUARANTY AND SURETY COMPANY.

(24) Filed November 17, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff,
vs.
Frank F. Graham and The Title Guaranty and Surety Company, a body corporate, Defendants.

The Title Guaranty and Surety Company, a body corporate, one of the defendants, by Charles F. Harley, its attorney, for pleas to the plaintiff's declaration, says:

1. For a first plea, this defendant says that the said Superintendent of Construction did not, with the sanction of the Regents of the Smithsonian Institution, on the said eighteenth day of March, 1908, annul the said agreement by giving notice in writing to that effect to the said Frank F. Graham.

2. And for a second plea this defendant says that said Superintendent of Construction did not obtain the sanction of the Regents of the Smithsonian Institution to annul the said agreement on or prior to the said 18th day of March, 1908.

3. And for a third plea this defendant says that the said Bernard R. Green, was the official in the entire charge of the work of constructing said building referred to in said declaration, and that the said Green in his own name and under his own signature and seal made the contract referred to, and all other contracts regarding the erection of said building; and that in pursuance of his said position in charge of said building the said Green was familiar with all the facts regarding the building of the same and the contracts made with reference thereto; and that by the terms of the agreement entered into by the said Green with the said Frank F. Graham, all granite (25) referred to in said agreement was to be furnished to the said Frank F. Graham in net dimension blocks, one block for each pattern, and the same to be furnished without unnecessary delay and without charge, free on board cars at the Quarry at Bethel, Vermont; and that by the terms of the said agreement it was further provided that the contractor should prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work, and that said plans should be submitted to the Superintendent of Construction not less than one month prior to the commencement of the work on the cut-

ting of the stones which they represented, so as give ample time for examination and approval, and that the setting plans for the lower courses of the basement story (the first course to be cut) should be prepared and submitted immediately after the execution of the contract; and his defendant further says that said contract was entered into on October the 23rd, 1906, and that immediately thereafter the said Frank F. Graham submitted to the said Superintendent of Construction setting plans for the lower courses of the basement story, and that the same were approved by the said Superintendent of Construction, and that he subsequently sent to the said Superintendent of Construction the setting plans for all the stone work, covered by the said contract, and that the same were in the possession of the said Superintendent of Construction and approved by him for all of said granite work; and that the said Frank F. Graham further to carry out the terms of his said contract, spent over five thousand dollars ($5,000) in the equipment of his yard with the proper machinery and facilities for handling the said granite, and that the *said* was known to the said Superintendent of Construction.

And this defendant further says that, nevertheless, in violation of the terms of said agreement, said Superintendent of Construction from the time of the making of the said contract, on October the twenty-third, 1906, to the first day of May, 1907, only furnished to the said Frank F. Graham one carload (26) of granite, which was shipped on January the seventeenth, 1907, and which contained 333 cubic feet of granite, and one carload on April 22, 1907, which contained 258 cubic feet; and that during all of said period the said Frank F. Graham was anxious and ready to perform his said agreement, and that the same was known to the said Superintendent of Construction; and that during the month of May, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham eight cars of said granite containing in the aggregate 1,650 cubic feet; and that in the *month June*, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham ten cars of said granite, containing in the aggregate 2,288 cubic feet; and that during the month of July, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham nineteen cars of said granite containing in the aggregate 4,491 cubic feet; and that during the month of August, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham five cars of said granite, containing in the aggregate 1,157 cubic feet; and that during the month of September, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham eighteen cars of

said granite, containing in the aggregate 4,624 cubic feet; and this defendant says that the said Superintendent of Construction thus caused to be shipped to the said Frank F. Graham during the period from the time of the making of said contract on October 23, 1906, to October 1, 1907, the date on which said contract was agreed to be finished by the terms of said agreement, only 14,801 cubic feet of granite required to be used under said agreement, although the total amount of the said granite required to be used and cut by the said Frank F. Graham under said contract amounted to over 61,000 cubic feet; and this defendant says that by reason of these great delays, the said Frank F. Graham suffered great pecuniary loss and damage, and that the same was known to the said Superintendent of Construction; and that in addition thereto, the greater por-

(27) tion of said granite so furnished was not in net dimension blocks as required by the terms of said agreement; and that in order to prepare the same for the purposes of said agreement, the said Frank F. Graham was obliged to expend large sums of money in excess of the amount which would have been required, had the said stone been delivered in proper net dimensions, and also to pay large sums for freight in excess on the same; and that the Superintendent of Construction was informed of said fact, and knew the same to be true; and also that the said granite was not delivered free on board cars at the Quarry at Bethel, Vermont, but at some place near Bethel, Vermont, and that the rate of freight that the said Frank F. Graham was obliged to pay on account of shipment was in excess of the freight which would have been paid, had the said granite been shipped from Bethel, Vermont; and that this fact was communicated and made known to the said Superintendent of Construction; and that after the said first day of October, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham during the month of October, 1907, twenty cars of said granite, containing in the aggregate 5,188 cubic feet; and that during the month of November, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham thirty-three cars containing in the aggregate 8,063 cubic feet; and that during the month of December, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham nineteen cars containing in the aggregate 4,798 cubic feet, and during the month of January, 1908, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham twenty-two cars, containing in the aggregate about 6,000 cubic feet; and that during the month of February, 1908, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham, twelve cars, containing in the aggregate about 3,000 cubic feet.

(28) And this defendant says that during the months of December, January and February, the said Frank F. Graham remonstrated to the said Superintendent of Construction against the shipment of the said granite in the volume and manner in which the same was being shipped by said Superintendent; and this defendant further says that by the terms of the said agreement, it was provided that payment should be made from time to time as the work progressed; and that the said Superintendent of Construction had an Inspector upon the premises of the said Frank F. Graham during the period of said contract, who was entirely familiar with all the actions of the said Frank F. Graham, and from time to time informed the said Superintendent of Construction of the conditions as they existed; and that during the early part of the month of March, 1908, on account of the manner in which the said granite had been shipped to him by the said Superintendent of Construction, the said Frank F. Graham stated that his yards were so overcrowded that it was impossible for him to carry on the work of properly cutting the said granite, and that in addition thereto he had advanced thousands of dollars on account of the freight on said granite, and that in addition thereto he was then informed that additional cars had been shipped to him by the said Superintendent of Construction, and that the said cars would have to be unloaded by the said Frank F. Graham, and the freight paid on same, or the said Frank F. Graham, would be subject to heavy charges for demurrage on said cars; and that in addition thereto, the greater portion of said granite as shipped to the said Frank F. Graham by the said Superintendent of Construction was not in net dimension blocks and that the expense of properly cutting the same had already been very heavy upon the said Frank F. Graham; and that there would be an additional expenditure necessary on account of the stone already shipped; and that in addition thereto, this stone had been shipped to the said Frank F. Graham during the time of the year in which it was very difficult on account of the weather to properly handle the same or cut it, (29) owing to the exposure to the weather; and that in addition thereto, said Superintendent of Construction had failed to pay the said defendant for the work and advances made by him in the manner in which the contract required the same to be paid; and this defendant says that by reason of the failure to make said payments and on account of the facts herein stated, the said Frank F. Graham, stopped work temporarily at his yards upon the said granite on Saturday, March 7, 1908, and that the said Frank F. Graham thereupon informed the said Superintendent of Construction that he had been obliged to stop said work, but that he would be glad to adjust the matter in any way which might be fair and equitable, and that it

was on account of his financial losses, and the conditions above stated, which were known to the said Superintendent of Construction, that he had been obliged to stop said work; and this defendant says, that the said Superintendent of Construction after said notice, and with knowledge of all the facts and circumstances herein set forth, and after the sixteenth day of March, 1908, undertook to annul the said contract as set forth in said declaration.

And this defendant says that by reasons of the matters and things herein stated the said Benjamin R. Green, Superintendent of Construction did not act in good faith in seeking to annul said contract, and that the annulment of said contract by the said Superintendent of Construction is not valid and binding upon the said Frank F. Graham, or this defendant.

I. And for a fourth plea, this defendant says that the said Bernard R. Green was the official in the entire charge of the work of constructing said building referred to in said declaration; and that the said Green in his own name and under his own signature and seal made the contract referred to, and all other contracts regarding the erection of said building; and that in pursuance of his said position in charge of said building, the said Green was familiar with all the facts regarding the building of the same and the contracts made with reference thereto; and that by the terms of the agreement entered into (30) by the said Green with the said Frank F. Graham all granite referred to in said agreement was to be furnished to the said Frank F. Graham, in net dimension blocks, one block for each pattern, and the same to be furnished without unnecessary delay and without charge, free on board cars at the Quarry at Bethel, Vermont; and that by the terms of the said agreement, it was further provided that the contractor should prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work, and that said plans should be submitted to the Superintendent of Construction not less than one month prior to the commencement of the work on the cutting of the stones which they represented, so as to give ample time for examination and approval, and that the setting plans for the lower courses of the basement story (the first course to be cut) should be prepared and submitted immediately after the execution of the contract; and this defendant further says that said contract was entered into on October the twenty-third, 1906, and that immediately thereafter the said Frank F. Graham submitted to the said Superintendent of Construction setting plans for the lower courses of the basement story, and that the same were approved by the said Superintendent of Construction, and that the said Frank F. Graham subsequently sent to the said Superin-

tendent of Construction the setting plans for all the stone work, covered by the said contract, and that the same were in the possession of the said Superintendent of Construction and approved by him for all of said granite work; and that the said Frank F. Graham, further to carry out the terms of his said contract, spent over five thousand dollars ($5,000) in the equipment of his yard, with the proper machinery and facilities for handling the said granite; and that the same was known to the said Superintendent of Construction.

And this defendant further says that, nevertheless, in violation of the terms of said agreement, the said Superintendent of Construction from the time of the making of the said contract, on October 23, 1906, to the first day of May, 1907, only (31) furnished to the said Graham one carload of granite, which was shipped on January 17, 1907, and which contained 333 cubic feet of granite, and *on* carload on April 22, 1907, which contained 258 cubic feet; and that during all of said period, the said Frank F. Graham was anxious and ready to perform his said agreement, and that the same was known to the said Superintendent of Construction; and that during the month of May, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham eight cars of said granite containing in the aggregate 1,650 cubic feet; and that in the month of June, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham ten cars of said granite containing in the aggregate 2,288 cubic feet; and that during the month of July, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham nineteen cars of said granite containing in the aggregate 4,191 cubic feet; and that during the month of August, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham, five cars of said granite, containing in the aggregate 1,157 cubic feet; and that during the month of September, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham eighteen cars of said granite, containing in the aggregate 4,621 cubic feet; and this defendant says that the said Superintendent of Construction thus caused to be shipped to the said Frank F. Graham during the period from the time of the makig of said contract on October 23, 1906, to October 1, 1907, the date on which said contract was agreed to be finished by the terms of said agreement, only 14,801 cubic feet of the granite required to be used under said agreement, although the total amount of the said granite required to be used and cut by the said defendant under said contract amounted to over 61,000 cubic feet; and this defendant says that by reasons of these great delays, the said Frank F. Graham suffered great pecuniary loss and damage; and that the same was

known to the said Superintendent of Construction; and that in addition thereto, the greater portion of said granite so furnish-
(32) ed was not in net dimension blocks as required by the terms of said agreement; and that in order to prepare the same for the purposes of said agreement, the said Graham was obliged to expend large sums of money in excess of the amount which would have been required had the said stone been delivered in proper dimensions, and also to pay large sums for freight in excess on the same; and that the Superintendent of Construction was informed of said fact and knew the same to be true; and also that the said granite was not delivered free on board cars at the Quarry at Bethel, Vermont, but at some place near Bethel, Vermont; and that the rate of freight that the said Frank F. Graham was obliged to pay on account of shipment was in excess of the freight which would have been paid had the said granite been shipped from Bethel, Vermont; and that this fact was communicated and made known to the said Superintendent of Construction; and that after the first day of October, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham during the month of October, 1907, twenty cars of said granite, containing in the aggregate 5,188 cubic feet; and that during the month of November, 1907, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham thirty-three cars containing in the aggregate 8,063 cubic feet; and that during the month of December, 1907, the said Superintendent of Construction, caused to be shipped to the said Frank F. Graham nineteen cars containing in the aggregate 4,798 cubic feet, and during the month of January, 1908, said Superintendent of Construction caused to be shipped to said Frank F. Graham twenty-two cars, containing *the* in the aggregate about 6,000 cubic feet; and that during the month of February, the said Superintendent of Construction caused to be shipped to the said Frank F. Graham twelve cars, containing in the aggregate about 3,000 cubic feet.

And this defendant says that during the months of December, January and February, the said Frank F. Graham remonstrated to the said Superintendent of Construction against the shipment of the said granite in the volume and manner in
(33) which the same was being shipped by said Superintendent; and this defendant further says that by the terms of the said agreement, it was provided that payment should be made from time to time as the work progressed; and that the said Superintendent of Construction had an Inspector upon the premises of the said Frank F. Graham during the period of said contract, who was entirely familiar with all the actions of the said Frank F. Graham, and from time to time informed

the said Superintendent of Construction of the conditions as they existed; and that during the early part of the month of March, 1908, on account of the manner in which the said granite had been shipped to him by the said Superintendent of Construction, the said Frank F. Graham stated that his yards were so overcrowded, that it was impossible for him to carry on the work of properly cutting the said granite; and that in addition thereto, he had advanced thousands of dollars on account of the freight on said granite; and that in addition thereto he was then informed that additional cars had been shipped to him by the said Superintendent of Construction, and that the said cars would have to be unloaded by the said Frank F. Graham, and the freight paid on same, or he would be subject to heavy charges for demurrage on said cars; and that in addition thereto, the greater portion of said granite as shipped to the said Frank F. Graham by the said Superintendent of Construction was not in net dimensions blocks, and that the expense of properly cutting the same had already been very heavy upon the said defendant, Frank F. Graham, and that there would be an additional expenditure necessary on account of the stone already shipped; and that in addition thereto, this stone had been shipped to the defendant during the time of the year in which it was very difficult on account of the weather to properly handle the same or cut it, owing to the exposure to the weather; and that in addition thereto, said Superintendent had failed to pay the said Graham for the work and advances made by him in the manner in which the contract required the same to be paid; and this defendant says that by

(34) reason of the failure to make said payments and on account of the facts herein stated, the said Frank F. Graham stopped work temporarily at his yards upon the said granite on Saturday, March 7, 1908; and that the said Frank F. Graham thereupon informed the said Superintendent of Construction that he had been obliged to stop said work, but that he would be glad to adjust the matter in any way which might be fair and equitable; and that it was on account of his financial losses, and the conditions above stated, which were known to the said Superintendent of Construction, that he had been obliged to stop said work; and this defendant says that the said Superintendent of Construction after said notice, and with knowledge of all the facts and circumstances herein set forth, and after the sixteenth day of March, 1908, undertook to annul the said contract as set forth in said declaration.

And this defendant says that the said Bernard R. Green, Superintendent of Construction, did not communicate the above matters and things herein set forth to the Regents of the Smithsonian Institution at the time when he obtained the

alleged sanction of the Regents of the Smithsonian Institution to the annulment of the said agreement, as set forth in said declaration, and that in failing to give such information to the said Regents, said Superintendent of Construction did not act in good faith, and that the alleged annulment of said contract with the sanction of the said Regents is not valid and binding upon the defendant, the said Frank F. Graham, or this defendant.

5. And for a fifth plea, this defendant says that the said alleged annulment of said contract on the eighteenth day of March, 1908, by the said Bernard R. Green, was the result of bad faith on the part of the said Bernard R. Green.

6. And for a sixth plea, this defendant says that the said alleged annulment of said contract was procured by the
(35) fraud of the said Bernard R. Green.

7. And for a seventh plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed.

8. And for an eighth plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed, in that the said plaintiff did not furnish to the said Frank F. Graham the necessary Bethel granite in net dimension blocks.

9. And for a ninth plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed, in that the plaintiff did not furnish to the said Frank F. Graham the necessary Bethel granite, without unnecessary delay.

10. And for a tenth plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants, and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed, in that the said plaintiff did not furnish to the said Frank F. Graham the necessary Bethel granite without charge, free on board cars at the
(36) Quarry at Bethel, Vermont.

11. And for an eleventh plea, this defendant says that the plaintiff hath not well and truly fulfilled, kept and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed, in that

the said plaintiff did not furnish to the said Frank F. Graham the necessary Bethel granite.

12. And for a twelfth plea, this defendant says that the fulfillment, keeping and performance of the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on the part of the said Frank F. Graham to be fulfilled, kept and performed, was prevented by the acts of the plaintiff.

13. And for a thirteenth plea, this defendant says, that after the annulment of said contract by the said Bernard R. Green, the expenditures of the plaintiff in completing said contract were not reasonble and fair.

14. And for a fourteenth plea, this defendant says that section four of said contract provides as follows:

(37)

"4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Superintendent of Construction, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor, legally appointed, shall have the power, with the sanction of the Regents of the Smithsonian Institution, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice, the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law."

And that Section Five of said contract provides as follows:
(38)

"5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived all expenses for inspection and superintendence and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part; provided, however, that the party of the first part may, with the prior sanction of the Regents of the Smithsonian Institution, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract."

And that the acts of the plaintiff prevented this defendant from freighting, cutting, boxing, and delivering complete all of the Bethel granite required for part "C" of the pavilion, before October 1, 1907; and that the plaintiff, without taking any further action in the premises under said contract through its said Superintendent of Construction, Bernard R. Green, permitted the said Frank F. Graham, after knowing the work under said contract was not completed in time, to proceed on
(39) said work till March, 1908, and accepted said work from October 1, 1907, to March, 1908; and that thereby the plaintiff became and is disentitled to recover on said contract executed on the twenty-third day of October, 1906.

15. And for a fifteenth plea, this defendant says that the plaintiff, without the knowledge and assent of this defendant, made material alterations in and to said contract secured by

the bond or writing obligatory in suit, whereby this defendant became and was released as surety thereon.

CHARLES F. HARLEY,
Attorney for The Title Guaranty and Surety Company, one of the defendants.

REPLICATIONS AND DEMURRERS TO PLEAS OF FRANK F. GRAHAM.

(40) Filed December 7, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs.
Frank F. Graham
and
Title Guaranty and Surety Company, a body corporate.

The plaintiff, the United States of America, by John C. Rose and Morris A. Soper, its attorneys, joins issue on the first and second pleas of Frank F. Graham, one of the defendants in the above-entitled case.

And the said plaintiff, by its said attorneys, says that the third plea of the said defendant is bad in substance and insufficient in law, and plaintiff assigns the following reasons for said demurrer:

(1) That there is nothing in the matters and things in said plea stated, which, as a matter of law, shows that the said Bernard R. Green, Superintendent of Construction, did not act in good faith in seeking to annul the said contract, and nothing in said matters and things in law sufficient to show that the annulment of said contract by said Superintendent of Construction is not valid and binding upon said defendant.

(2) Because said plea tenders not one but several breeches of the contract, and is, therefore, bad for duplicity.

(3) And for other reasons to be assigned at the hearing.

And the said plaintiff, by its said attorneys, says that the fourth plea of the said defendant is bad in substance and in-

sufficient in law, and the plaintiff assigns the following reasons for said demurrer.

(41) (1) That, as a matter of law, the said Bernard R. Green was not bound to communicate all the alleged matters and things set forth in the said fourth plea to the Regents of the Smithsonian Institution at the time when he obtained the sanction of the Regents of the said Smithsonian Institution to the annulment of the said agreement set forth in the said declaration.

(2) That the failure of the said Superintendent of Construction to give information to the Board of Regents of the Smithsonian Institution at the time he obtained their sanction to the annulment of said agreement, as set forth in said declaration, does not, as a matter of law, show that the said Superintendent of Construction acted in bad faith, nor does it show that the alleged annulment of said contract with the sanction of the said Regents is not valid and binding upon the said defendant.

(3) That the said plea tenders not one but several breaches of the contract, and is, therefore, bad for duplicity.

(4) And for other reasons to be assigned at the hearing.

And for replication to the fifth plea of the said defendant, the plaintiff, by its said attorneys, says that the annulment of the said contract on the 18th day of March, 1908, by the said Bernard R. Green was not the result of bad faith on the part of the said Bernard R. Green.

And for replication to the sixth plea of the said defendant, the plaintiff, by its said attorneys, says that the said annulment of the said contract was not procured by the fraud of the said Bernard R. Green.

And for replication to the seventh plea of the said defendant, the plaintiff, by its said attorneys, says that it hath well and truly fulfilled, kept, and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed.

And for replication to the eighth plea of the said defendant, the plaintiff, by its said attorneys, says that the plaintiff did furnish to the said Frank F. Graham, the necessary Bethel granite in net dimension blocks.

And for replication to the ninth plea of the said defendant, the plaintiff, by its said attorneys, says that it did furnish

to the said Frank F. Graham the necessary Bethel gra
(42) without unnecessary delay.

And for a first replication to the tenth plea of the said
fendant, the plaintiff says that the plaintiff did furnish to
said Frank F. Graham the necessary Bethel granite with
charge, free on board cars at the quarry at Bethel, Verm

And for a second replication to the said tenth plea of
said defendant, the plaintiff says that the said Frank F.
ham had waived and abandoned any right on his part to in
upon the delivery of the necessary Bethel granite free on bo
cars at the quarry at Bethel, Vermont.

And for replication to the eleventh plea of the said defe
ant, the plaintiff says that the plaintiff did furnish to the s
Frank F. Graham the necessary Bethel granite.

And for replication to the twelfth plea of the said defe
ant, the plaintiff says that the fulfillment, keeping and p
formance of the covenants and agreements set forth in said
vertisement, specifications, instructions, general conditions a
contract on the part of the said Frank F. Graham to be f
filled, kept and performed was not prevented by the acts of t
plaintiff.

And for replication to the thirteenth plea of the said
fendant, the plaintiff says that after the annulment of the sa
contract by the said Bernard R. Green, the expenditures of t
plaintiff in completing the said contract were reasonable a
fair.

And the said plaintiff, by its said attorneys, says that t
fourteenth plea of the said defendant is bad in substance a
insufficient in law, and plaintiff assigns the following reaso
for said demurrer.

(43) (1) That the fact that the said plaintiff permitted th
said Frank F. Graham, after knowing the work under sai
contract was not completed in time, to proceed with said wor
till March, 1908, and accepted said work from October 1, 190
to March, 1908, did not disentitle the plaintiff to recover unde
the contract executed on the 23rd day of October, 1906.

(2) And for other reasons to be assigned at the hearing

JOHN C. ROSE,
MORRIS A. SOPER,
Attorneys for Plaintiff.

REPLICATIONS AND DEMURRERS TO PLEAS OF TITLE GUARANTY & SURETY COMPANY.

(44) Filed December 7, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs.
Frank F. Graham
and
Title Guaranty and Surety Company, a body corporate.

The plaintiff, the United States of America, by John C. Rose and Morris A. Soper, its attorneys, joins issue on the first and second pleas of the Title Guaranty and Surety Company, a body corporate, one of the defendants in the above-entitled case.

And the said plaintiff, by its said attorneys, says that the third plea of the said defendant is bad in substance and insufficient in law, and plaintiff assigns the following reasons for said demurrer:

(1) That there is nothing in the matters and things in said plea stated, which, as a matter of law, shows that the said Bernard R. Green, Superintendent of Construction, did not act in good faith in seeking to annul the said contract, and nothing in said matters and things in law sufficient to show that the annulment of said contract by said Superintendent of Construction is not valid and binding upon said defendant.

(2) Because said plea tenders not one but several breeches of the contract, and is, therefore, bad for duplicity.

(3) And for other reasons to be assigned at the hearing.

And the said plaintiff, by its said attorneys, says that the fourth plea of the said defendant is bad in substance and insufficient in law, and the plaintiff assigns the following reasons for said demurrer

(45) (1) That, as a matter of law, the said Bernard R. Green was not bound to communicate all the alleged matters and things set forth in the said fourth plea to the Regents of the Smithsonian Institution at the time when he obtained the

sanction of the Regents of the said Smithsonian Institution to the annulment of the said agreement set forth in the said declaration.

(2) That the failure of the said Superintendent of Construction to give information to the Board of Regents of the Smithsonian Institution at the time he obtained their sanction to the annulment of said agreement, as set forth in said declaration, does not, as a matter of law, show that the said Superintendent of Construction acted in bad faith, nor does it show that the alleged annulment of said contract with the sanction of the said Regents is not valid and binding upon the said defendant.

(3) That the said plea tenders not one but several breaches of the contract, and is, therefore, bad for duplicity.

(4) And for other reasons to be assigned at the hearing.

And for replication to the fifth plea of the said defendant, the plaintiff, by its said attorneys, says that the annulment of the said contract on the 18th day of March, 1908, by the said Bernard R. Green was not the result of bad faith on the part of the said Bernard R. Green.

And for replication to the sixth plea of the said defendant, the plaintiff, by its said attorneys, says that the said annulment of the said contract was not procured by the fraud of the said Bernard R. Green.

And for replication to the seventh plea of the said defendant, the plaintiff, by its said attorneys, says that it hath well and truly fulfilled, kept, and performed the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on its part to be fulfilled, kept and performed.

And for replication to the eighth plea of the said defendant, the plaintiff, by its said attorneys, says that the plaintiff did furnish to the said Frank F. Graham the necessary Bethel granite in net dimension blocks

And for replication to the ninth plea of the said defendant, the plaintiff, by its said attorneys, says that it did furnish to the said Frank F. Graham the necessary Bethel granite (46) without unnecessary delay.

And for a first replication to the tenth plea of the said defendant, the plaintiff says that the plaintiff did furnish to the said Frank F. Graham the necessary Bethel granite without charge, free on board cars at the quarry at Bethel, Vermont.

And for a second replication to the said tenth plea of the said defendant, the plaintiff says that the said Frank F. Graham had waived and abandoned any right on his part to insist upon the delivery of the necessary Bethel granite free on board cars at the quarry at Bethel, Vermont.

And for replication to the eleventh plea of the said defendant, the plaintiff says that the plaintiff did furnish to the said Frank F. Graham the necessary Bethel granite.

And for replication to the twelfth plea of the said defendant, the plaintiff says that the fulfillment, keeping and performance of the covenants and agreements set forth in said advertisement, specifications, instructions, general conditions and contract on the part of the said Frank F. Graham to be fulfilled, kept and performed was not prevented by the acts of the plaintiff.

And for replication to the thirteenth plea of the said defendant, the plaintiff says that after the annulment of the said contract by the said Bernard R. Green, the expenditures of the plaintiff in completing the said contract were reasonable and fair.

And the said plaintiff, by its said attorneys, says that the fourteenth plea of the said defendant is bad in substance and insufficient in law, and plaintiff assigns the following reasons for said demurrer.

(47) (1) That the fact that the said plaintiff permitted the said Frank F. Graham, after knowing the work under said contract was not completed in time, to proceed with said work till March, 1908, and accepted said work from October 1, 1907, to March, 1908, did not disentitle the plaintiff to recover under the contract executed on the 23rd day of October, 1906.

(2) And for other reasons to be assigned at the hearing.

And for replication to the fifteenth plea of the said defendant, the plaintiff says that the plaintiff did not without the knowledge and assent of the said defendant make material alterations in and to said contract secured by the bond or writing obligatory sued on in this suit.

JOHN C. ROSE,
MORRIS A. SOPER,
Attorneys for Plaintiff.

JOINDER OF ISSUE.

(48) Filed December 10, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs.
Frank F. Graham, and The Title Guaranty & Surety Company, a body corporate.

The defendant, The Title Guaranty & Surety Company, a body corporate, as to the replications and as to each of them, of the plaintiff to this defendant's pleas to the plaintiff's declaration, says that it joins issue on said replications and each of them.

CHARLES F. HARLEY,
Counsel for Defendant, The Title Guaranty & Surety Company.

ORDER OF COURT SUSTAINING DEMURRERS OF PLAINTIFF TO THIRD, FOURTH AND FOURTEENTH PLEAS OF FRANK F. GRAHAM.

(49) Filed February 5, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs.
Frank F. Graham
and
Title Guaranty and Surety Company, a body corporate.

The demurrers of the plaintiff to the third, fourth and fourteenth pleas of Frank F. Graham, one of the defendants in the above entitled case, having been considered and counsel having been heard,

It is ordered this 5th day of February, 1910, by the Circuit Court of the United States for the District of Maryland, that the said demurrers be, and the same are hereby sustained.

THOS. J. MORRIS,
District Judge.

ORDER OF COURT SUSTAINING DEMURRERS OF PLAINTIFF TO THIRD, FOURTH AND FOURTEENTH PLEAS OF TITLE GUARANTY & SURETY COMPANY.

(50) Filed February 5, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs.
Frank F. Graham
and
Title Guaranty and Surety Company, a body corporate.

The demurrers of the plaintiff to the third, fourth and fourteenth pleas of Title Guaranty and Surety Company, a body corporate, one of the defendants in the above entitled case, having been considered and counsel having been heard,

It is ordered this 5th day of February, 1910, by the Circuit Court of the United States for the District of Maryland, that the said demurrers be, and the same are, hereby sustained.

THOS. J. MORRIS,
District Judge.

DOCKET ENTRIES.

(51)

June 1, 1910, Judgment in open court in favor of the plaintiff on the demurrers to 3rd, 4th, and 14th Pleas of both defendants and on each of said demurrers.

" " " Issue joined on the replications of the plaintiff and each of them by the defendant, Frank F. Graham.

52) Whereupon, for trying the issues aforesaid above joind, between the parties aforesaid, it is ordered by the court ere that eighteen persons from the panel of petit jurors drawn nd returned to the court here, in accordance with the statute n such cases made and provided, be drawn by ballot, and there-

upon the eighteen persons being so drawn by ballot and written upon two lists, one of which lists is delivered to the counsel for the respective parties, and the counsel of each of the said parties having stricken out three names from the said lists, thereupon the remaining twelve persons being called, come that is to say:

Charles J. Benson,	Louis O'Donnell,
Andrew Lambert,	George E. Shaffer,
August Pieper,	Edward T. Hand,
John R. Hall,	Clarence H. Black,
Herman Boehm,	Gassaway H. Battee,
Oscar Koenig,	G. Murray Seal,

who being empannelled and sworn to say the truth in the premises, upon their oath, do say that they find for the plaintiff and assess the damages of the said plaintiff to the sum of fifty thousand dollars ($50,000.00).

And thereupon the said jurors returned and filed their sealed verdict, in the words and figures following, to-wit:

SEALED VERDICT.

(53) Filed June 25, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff, *vs.* Frank F. Graham and the Title Guaranty & Surety Company, a corporation, duly incorporated under the laws of the State of Pennsylvania, Defendants.	No. 49 Civil Docket "E."

We, the jurors, especially empanelled in the above-entitled case, having been duly sworn, and having heard and considered the testimony and instructions of the court, do upon our oaths, before separating, find for the plaintiff and do assess damages to the sum of fifty thousand dollars ($50,000), and do hereby authorize and direct our foreman, Charles J. Benson, to deliver this, our signed and sealed verdict, to the court.

Given under our hands and seals this twenty-fourth day of June, 1910.

CHARLES J. BENSON, [Seal]
ANDREW LAMBERT, [Seal]
AUGUST PIEPER, [Seal]
JOHN R. HALL, [Seal]
HERMAN BOEHM, [Seal]
LOUIS O'DONNELL, [Seal]
OSCAR KOENIG, [Seal]
GEORGE E. SHAFFER, [Seal]
EDWARD T. HAND, [Seal]
CLARENCE H. BLACK, [Seal]
(54) GASSAWAY H. BATTEE, [Seal]
G. MURRAY SEAL, [Seal]

(55) Therefore it is considered by the court here that the said plaintiff recover against the said defendants, as well the said sum of fifty thousand dollars for its damages aforesaid, as the sum of two hundred and eighty dollars and nineteen cents, ($280.19), adjudged by the court here unto the said plaintiff for its costs and charges about its suit in this behalf expended; and the said defendants in mercy, and that the said plaintiff have hereof its execution, etc.

Memorandum.

Verdict was rendered in the above entitled case on the 25th day of June, 1910, and judgment entered on said verdict on the 28th day of June, 1910.

ORDER OF COURT EXTENDING THE TIME FOR SIGNING THE BILLS OF EXCEPTIONS.

(56) Filed June 25, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America
vs.
Frank F. Graham, and The Title Guaranty and Surety Company, a body corporate.

Upon the application of counsel for the defendants, it is ordered by the Circuit Court of the United States for the District of Maryland this 25th day of June, 1910, that the time

for signing the bills of exceptions in this case, be, and it is hereby extended until the fifth day of November, 1910.

THOS. J. MORRIS, Judge.

ORDER OF COURT EXTENDING THE TIME FOR SIGNING AND FILING THE BILLS OF EXCEPTIONS.

(57) Filed October 27, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff,
vs.
Frank F. Graham, and The Title Guaranty and Surety Company, a body corporate, Defendants.

Ordered by the Circuit Court of the United States for the District of Maryland this 27th day of October, 1910, upon the application of the attorney for the United States of America, that the time for signing the bills of exceptions in this case be, and it is hereby extended until the twenty-first day of November, 1910.

THOS. J. MORRIS, Judge.

BILLS OF EXCEPTIONS.

(58) Filed November 2, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff,
vs.
Frank F. Graham, and The Title Guaranty and Surety Company, a body corporate, Defendants.

First Bill of Exceptions.

At the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

BERNARD R. GREEN, a witness of full age, having been duly sworn, testified as follows:

Q. (Mr. HILL) Mr. Green, will you please state to the gent'emen of the jury if you know the parties to this suit,

that is, the plaintiff and the defendants in the suit? A. I do.

Q. State who they are, please, who the defendant is? A. Mr. Frank E. Graham and the Surety Company whose name has been given here. I can not recall exactly what it is.

Mr. HILL: I want to offer this act in evidence.

Mr. HARLEY: The court takes judicial notice of that.

Mr. HILL: We want to offer in evidence chapter 1007 of the Statutes at Large of the Acts of the Fifty-Seventh Congress, page 1102, Volume 32, Statutes at Large, dealing with the building of the National Museum. I will read it.

(Act referred to was then read by Mr. Hill and is herby incorporated by reference in this bill of exceptions as fully and effectually as though the same had been set forth at large herein.)

Q. Will you state, Mr. Green, is, acting under that authority, you made any contract on behalf of the Government with the defendant in this case? A. I did, I made two contracts, but it is the second one, I suppose, which is referred to in this
(59) suit. It was entered into in October, 1906.
what they are?

Q. Will you look at these papers and state to the jury what they are?

Mr. HARLEY: We admit the execution of the contract.

The said papers are as follows:

ADVERTISEMENT.

Proposals for Cut Granite.

(60) Office of Building for National Museum,
Library of Congress,
Washington, D. C., September 20, 1906.

Sealed proposals for cutting and delivering the Bethel white granite from Vermont and for furnishing, cutting and delivering the Milford, Massachusetts, pink granite required for the south pavilion of the new building for the National Museum, in this city, will be received at this office until two o'clock P. M. on Saturday, the thirteenth day of October, 1906, and publicly opened immediately thereafter.

Specifications, general instructions and conditions and blank forms of proposal may be obtained on application to this office.

BERNARD R. GREEN,
Superintendent of Construction.

BUILDING FOR THE NATIONAL MUSEUM.

(61) Washington, D. C., Sept. 20, 1906.

SPECIFICATIONS

FOR

CUT GRANITE FOR THE SOUTH PAVILION EXTERIOR WALLS.

Description and Conditions:

1. The cut granite called for in the foregoing advertisement and described in these specifications comprises all the stones necessary to the construction of the exterior weather walls of the South Pavilion of the building and for the immediate parts of the exterior approaches thereto, as further described below and as represented in the nine (9) sheets of drawings Nos. 148, 149, 150, 151, 152, 153, 156, 157 and 158, prepared by

HORNBLOWER AND MARSHALL,
Architects, Washington, D. C.

2. The several drawings are as follows:

No. 148, Plan of Basement.
149, Plan at First Story, with Elevation of Approaches and Elevation and Soffit Plan of Main Portico.
150, Plans at Second and Third Stories.
151, Plan at Attic Story and Plan of Dome and Roofs.
152, Front and Side Elevations of the Pavilion.
153, Section on North and South Axis.
156, One-half-inch scale Side Elevation and Section of Portico.
157, One-half-inch scale of Front Elevation of Portico.
158, One-quarter-inch Plans and Sections of Dome Walls and Pediments.

3. The Construction of the body of the Museum building, outside of the South Pavilion, is now under way—the walls of (62) the basement story are up and those of the first and second stories being built.

4. The work herein specified will be considered in three parts, namely:

A. The stone work of the basement walls from the ground up to the first floor level, or top of course AA, of the building proper, and extending each side to the heavy zig-zag line marked "Line of Old Contract." This part is exclusive of the arched driveway and all parts south of its north wall, and south of the front edge of the portico platform. See especially drawings Nos. 149 and 152.

NOTE. This description of the extent of part A is correct if Milford granite be used. If Bethel granite be used the part on each side of the pavilion marked "Milford Pink Granite" in the elevation on drawing No. 152 will be omitted from the estimate, because if Bethel granite be used this part would have to be done independently by the Government in Milford granite.

B. All of the granite walls, steps, die blocks, seats, and landing and platform work south of part "A" to complete the approaches to the building. Shown especially in plan No. 149 and side elevation plan No. 152.

C. All of the granite work of the pavilion all around above the first floor level and above the adjacent roofs and between the heavy lines of the existing work marked "Line of Old Contract," excepting the parts in the third story marked "Mount Airy Granite in Other Contract." See especially drawings No. 152 and 156.

(63) 5. The granite stock for the whole of part "C" will be from the quarry at Bethel, Vermont, from which the stone for the first and second stories is now being taken, and it is proposed to use the same granite in the remaining parts, "A" and "B," of the South Pavilion work.

It is, however, contemplated, but not to be decided until after the proposals are received, to use the Milford granite, similar to that in the present basement story of the building, for parts "A" and "B" of the stone work instead of the Bethel granite.

The necessary Bethel granite stock, in net dimension blocks, is to be furnished to the Government by the present

contractor, free on board cars at the quarry in Bethel, ready for the contractor for the cutting of the granite to transport it to his cutting yards for that purpose.

Bidders for the Bethel granite work will therefore bid on the basis and understanding that the granite, in net dimension blocks, one block for each separate pattern, will be furnished to them without unnecessary delay and without charge, free on board cars at the quarry at Bethel, Vermont. Any block or part of block so furnished and subsequently spoiled in the cutting or otherwise lost or used by the contractor must be replaced at his own expense.

Bidders for the Milford granite work will include the cost of the necessary stock.

6. Bids will therefore be submitted as follows:

Proposal No. 1. For freighting, cutting, boxing, and de-
(64) livering complete all of the Bethel granite required for part "C" of the pavilion, before October 1, 1907.

Proposal No. 2. For freighting, cutting, boxing and delivering complete all of the Bethel granite required for part "A" of the pavilion, before April 1, 1907.

Proposal No. 3. For freighting, cutting, boxing and delivering complete all of the Bethel granite required for part "B" of the pavilion, within eight (8) months after the same may have been ordered by the United States at any time before March 15, 1909.

Proposal No. 4. For furnishing, cutting, boxing, and delivering all of part "A" of the pavilion in the said Milford granite, before April 1, 1907.

Proposal No. 5. For furnishing, cutting, boxing, and delivering all of part "B" of the pavilion in the said Milford granite, within eight (8) months after the same may have been ordered by the United States at any time before March 15, 1909.

It is to be understood that the several proposals will be considered separately and individually, and that any one or more of them may be accepted independently and regardless of the others.

7. Figures on the drawings are to be taken wherever they occur in preference to scale dimensions.

All explanations and notes on the drawings are to be considered a part of the drawings and used as such.

8. Any discrepancies or obscurities discovered in the draw-
(65) ings or specifications, or both, must be immediately brought to the notice of the Superintendent of Construction for explanation before proceeding with any work affected by them.

9. The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at one-quarter inch to the foot scale (¼"-1'), prepared, lettered and numbered as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of the work on the cutting of the stones they represent, to give ample time for examination and approval. The setting plans for the lower courses of the basement story (the first courses to be cut) must be prepared and submitted immediately after execution of the contract.

10. Blue or white prints of these drawings, mounted on muslin, not exceeding twelve of each sheet, shall be furnished by the contractor, at his own cost, to the Superintendent of Construction promptly as may be called for from time to time for the use of his office and operations on the building.

11. Each and every cut stone shall be marked by the contractor plainly with indelible black paint, both on an end joint of the stone and the outside of the boxing, with its proper course letter and number before shipment from the cutting yards.

12. As soon as each stone is finished and accepted by the Government inspector at the cutting yards, it must be carefully and substantially boxed with stout lumber that will not stain the stone and strapped and secured with galvanized iron
(66) and galvanized nails. This boxing shall be at least as good as the inspector may approve of, but the contractor will remain responsible for the safe delivery of the stone on the site of the Museum building.

13. The preparation and delivery of the stone must proceed as nearly as may be directed by the Superintendent of Construction in the natural order of building.

14. The drays delivering stone at the site of the building shall haul the loads to points designated by the Master Me-

chanic. They will there be unloaded and the stones piled by the United States.

15. The contractor shall provide all necessary patterns, gauges, templates, squares, edges, tools, implements, machinery, buildings, materials, labor, etc., and transportation for the most prompt, expeditious and complete performance of all work involved in furnishing, preparing and delivering at the site of the building all of the cut and rough granite called for in the contract.

16. Full size profiles will be supplied to the contractor by which he shall accurately make the necessary templates and patterns.

17. The Act of Congress, approved March 3, 1903, authorizing the construction of the building provides that "a contract or contracts for its completion is hereby authorized to be entered into subject to appropriations to be made by Congress." The contracts for the cut granite entered into under these specifications and the continuity of the work will there-
(67) fore be subject to the appropriations that Congress may make from year to year, as is done with many other Government contracts.

The quantity of cut granite to be furnished each fiscal year will be regulated as nearly as practicable by the Superintendent of Construction to correspond to the respective annual appropriation in justice to other parts of the work and other contractors; should any such appropriation happen to be inadequate to the full practicable progress of the year's work, otherwise the contractors shall make the progress hereinafter stipulated to be made for completion.

18. Bidders are required to return all drawings with their proposals and, if not to submit proposals, to return them immediately.

Milford Granite:

19. The Milford granite hereinabove referred to is to be of the same color, quality and character as the granite now built into the basement walls of the said Museum building and which came from the quarries at Milford, Massachusetts.

Cutting:

20. All the stock must be essentially full to the lines and dimensions on the drawings. The several stones must also be such as will bond well with the brick backing of the walls.

21. The finished dimensions, gauges, etc., of all stones must be to the United States standard measure.

22. The grades of cutting for the several parts of the
(68) work will be as follows:

The cutting of the basement story, or part "A" of the work, will be good 4-cut work, excepting the portico platform, which will be good six-cut work.

The cutting of the curved retaining walls and all other portions of part "B" will be good 4-cut work, excepting the platforms, steps, seats, and the dies of the steps, which will be good 6-cut work.

The cutting of the superstructure above first-story floor up to the top of the entablature will be good 6-cut work, and of the remainder of the pavilion thence up to the top of the granite work will be good 4-cut work.

The cutting of the Greek ornament in the frieze bands at the four corners of the tower is to be incised and not raised.

The fluting of columns and pilasters will be cut with especial care and in strict conformity with the full size details to be furnished to the contractor by the United States. The column shafts will be straight for the lower third of their height, and from thence will diminish with entasis which must be carefully cut in accordance with the said full size details, the fluting and fillets to conform to the entasis.

The quality of the cutting and dressing and of the rectitude of shape of the stones shall be fully equal to that in the existing granite work of the building, which should be examined by bidders.

23. Any machine dressing of the stone shall be re-dressed by hand if deemed necessary by the Superintendent of Construc-
(69) tion to produce the desired hand-cut quality of work.

24. All bush hammer cuts must be parallel and squarely across the faces of the stones as will be directed. All cutting of arrises and of all projecting mouldings, fillets, etc., shall be carefully done to avoid "stunning." All bushing and pointing must be done with sharp tools.

25. Hidden and rear faces of the work, top angles of mouldings or other projections cut on to stones, and other parts of the work unseen from the fronts of the building or from any of the windows, etc., may be left more or less roughly finished as may be specially directed, but the stock must be full to avoid holes or lumps to collect dust and water.

26. All sills, projecting courses, platforms, copings, etc., will be cut with proper seats and washes for jambs, architraves, etc.

All moulded work will be accurately profiled, cut to dimensions and jointed as shown on the drawings and by such details and models as will be furnished to the contractor by the Superintendent of Construction.

27. The jointing of the main entrance steps must be as shown in the drawings, the steps to be of at least the extra thickness indicated to insure strength. The platforms must be of suitable thickness for strength instead of the 3 inches marked on the plans. The large platform between the two runs of the steps will be laid out in pattern, as indicated on first floor plan, drawing No. 149. The border lines of the pattern in this platform will be of pink or red granite not to be included in this contract. The steps and also the platform will be cut with a rise or crowning surface to the centre, as (70) shown in the drawings. The platforms will be so laid that the water will flow to the ornamental border at the bottom of the steps in front of the seats. The panels in this border will have the pattern shown cut through the entire thickness of the slab as water outlets.

28. The floor of the entrance portico will be of the design in granite and marble shown in the plan (drawing No. 149) the granite to be the same as that of the contiguous parts of the platform, steps, etc., but the marble is not to be included in the contract. The same applies to the marble panels in the band at the top of the doorway recess in the portico and in the head of the doorway, and to the marble grilles in the four great semi-circular windows.

29. No patching or mending of stones in any way whatever will be allowed excepting in rare and unimportant cases, and then only by special consent of the Superintendent of Construction in each separate case.

Carving:

30. The contractor will do all carving and cut mouldings shown in the drawings, excepting the carving of the column and pilaster capitals and that of the head of the main entrance doorway, but no carving is to be done until exact full size details are furnished for the same to the contractor by the United States.

31. The caps for the columns and pilasters are to be
(71) roughed out by the contractor in accordance with the full size details or models which will be furnished by the United States for this part of the work, but the final carving itself, as well as that for the door head, is not included in the contract, but will be otherwise procured by the United States.

Jointing:

32. All joints, beds and builds must be full and fine joint cut and free from large plug holes, the axe to be freely used. They must be carefully worked from true and full margin drafts. All dimensions of stones given in the drawings and schedules are the full net dimensions without allowance for thickness of joints. The contractors will therefore allow for joints as follows: For all bed joints one-quarter of an inch (¼") and for all end or vertical joints three-sixteenths of an inch (3-16"). Particular care must be exercised in the cutting that all the joints shall be exact and uniform. All joints must be fine cut and full within three inches (3") of the faces of the stones and axed full for at least three-quarters of the bed and one-half of the build and end joints, the fullness properly distributed and no deep or wide plugs holes or cavities.

33. False jointing deeply and carefully cut for pointing with mortar may be done in certain cases where deemed proper and allowed by the Superintendent of Construction.

34. Every stone must be out of wind, die square, of full pattern throughout and exactly to the dimensions and shape called for by the drawings.

35. Dove-tail lewis holes of proper depth must be accu-
(72) rately cut in the top bed of every stone and so located that the stone will hang level and plumb.

Order of Delivery:

36. The several courses of stone must be promptly completed and delivered for the natural course of building so that construction may proceed regularly in proper order. Payment for stones delivered much out of proper order, as may be decided by the Superintendent of Construction, will be reserved.

Payments in general will be regulated by the promptness, system and good progress made by the respective contractors in fulfilling the time schedule above laid down.

Read the General Instructions and Conditions herewith.

Office of the Superintendent of Construction,

Building for National Museum.

GENERAL INSTRUCTIONS AND CONDITIONS TO GOVERN BIDDERS AND CONTRACTORS.

(73)

General Instructions.

1. The attention of bidders is especially invited to the Acts of Congress approved February 26, 1885, and February 23, 1887, as printed in volume 23, page 332, and volume 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. All bids must be made upon printed forms to be obtained at this office.

4. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a judge or clerk of a United States court, United States district attorney, United States commissioner, or judge or clerk of a State court of record, with the seal of said court attached.

5. A firm as such will not be accepted as surety, nor a partner for a copartner or firm of which he is a member. Stock holders who are not officers of a corporation may be accepted
(74) as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.

6. When the principal, a guarantor, or a surety is an individual, his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

7. Each guarantor will justify in a sum of twenty thousand dollars. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, chapter 120, and is expressed in the guaranty attached to the bid.

8. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Anyone signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.
(75)

9. The place of residence of every bidder, and post-office address, with county and State, must be given after his signature.

10. All prices must be written as well as expressed in figures.

11. One copy each of the advertisement, the general instructions and conditions, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

12. Proposals must be prepared without assistance from any person connected with or employed under this office.

13. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

14. All bids must be strictly in accordance and conformity with the specifications, drawings, samples, or models therefor, supplied by this office.

15. Any proper information desired by the bidder, and not found in the specifications herewith or in the accompanying schedule, drawings, samples, or models, may be had
(76) on application to this office.

16. Each sample submitted with bids must bear the name of the bidder and reference to the bid to which it belongs distinctly and permanently marked upon it. It must be delivered at this office at the bidder's expense before the hour of opening bids, and will be retained by the Government as long as may be deemed advisable by the Superintendent of Construction.

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions, limitations, or provises attached to proposals will be liable to render them informal and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If a bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the Superintendent of Construction, and, when received, it shall be handed to him or his authorized agent unread.

20. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for Cut granite, to be opened October 13, 1906," and inclosed in another sealed envelope addressed to Bernard R. Green, Superintendent, Building and Grounds, Library of Congress, Washington, D. C., but otherwise unmarked. This package must be delivered at or before the hour advertised for the opening of the bids, and no responsibility shall attach to the Superintendent of Construction or his officers for the premature opening of any proposal not (77) plainly indorsed and sealed as above required, to show that it is a proposal and the particular purpose to which it relates.

21. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the samples and drawings referred to in the specifications, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

22. The United States reserves the right to reject any and all bids and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Superintendent of Construction, or any bid which is palpably unbalanced or obviously below what the work can be done for, or the bid of any bidder reasonably suspected of being interested in more than one bid for the same item, or who shall fail to produce, when called upon to do so, evidence satisfactory to the Superintendent of Construction of the said bidder's ability to do the contemplated work within the required time, including his control of the necessary means and equipment. The failure of a bidder to make satisfactory progress or to complete on time similar work under previous contracts with the United States will be duly considered in canvassing bids and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bid-
(781) der is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

23. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of at least one-third of the amount of the contract, within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in accordance with the blank forms which can be inspected at this office, and which will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

24. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum named in the bond.

25. The Superintendent of Construction will decide when the time advertised for the opening of bids has arrived, and no proposal for that opening will thereafter be received as formal.

26. Bidders are invited to be present at the opening of the bids.

General Conditions.

27. A copy of the advertisements, and of the specifications, instructions and general conditions, will be attached to the contract and form part of it.

28. The officer in charge of the Museum building under the law is designated in the instructions, conditions, and contract as the Superintendent of Construction.
(79)

29. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

30. Transfers of contracts, or of interest in contracts, are prohibited by law.

31. The contractor will not be allowed to take advantage of any error or omission in the specifications as full instructions will always be given should such error or omission be discovered.

32. The decision of the Superintendent of Construction as to quality and quantity shall be final.

33. All materials or services furnished must be delivered or performed at such places on the site of the building for the National Museum, and in such order and at such times as may be directed under the terms of the contract.

34. All materials delivered or work performed under the contract, that may be rejected, must, upon due notice of such rejection, be removed from the premises of the building, or corrected by the contractor without delay and at his own cost.

35. All drawings referred to in the specifications are permanently on file in this office. Photographic or other copies thereof, only, may be sent out to bidders and supplied for use of contractors, but, in general, will not be attached to either
(80) specifications or contracts.

36. The premises of the contractor shall at all times, during the progress of the work, be open to access by the Superintendent of Construction or any person authorized by the officer in charge, for the purpose of inspection of the work under the contract.

37. If the contractor is not present on the work wherever or whenever it may be necessary to give directions to him, orders will be given by the Superintendent of Construction or his representative to, and shall be received and obeyed by, the foreman or other employee of the contractor who may have immediate charge of the particular work in relation to which the orders may be given.

38. The contractor shall, when required to do so by the Superintendent of Construction, remove from the work any foreman, workman, or other employee of the contractor who shall refuse or neglect to obey the directions of the Superintendent of Construction, the master mechanic, or inspector employed by the United States, or who shall be deemed by him to be incompetent or unfaithful.

39. No work will be considered as accepted which may be defective in its construction or deficient in any of the requirements of the specifications, in consequence of any failure of any inspector or subordinate agent of the United States to point out said defect or deficiency during construction; and the contractor will be required to correct any imperfect work whenever discovered, before final acceptance of the work.

(81) 40. The contractor's employees upon the site of the building for the National Museum shall at all times conform to the police rules and discipline established by the Superintendent of Construction and enforced by the master mechanic.

41. Payments will be made from time to time as the progress of the work may warrant. A percentage of ten (10%) per centum will be reserved from each payment until the whole of the cut granite called for by the annexed contract shall have been satisfactorily delivered and accepted.

42. The contractor will be required to commence work under the contract within ten days after the date of notification of approval of the contract by the Superintendent of Construction, to prosecute the said work with faithfulness and energy, and to complete it within the time stipulated in the accompanying specifications.

43. Unless extraordinary and unforeseable conditions supervene, the time allowed in these general conditions for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital and experience. If the work is not completed within the period stipulated in the contract, the Superintendent of Construction may, with the prior sanction of the Regents of the Smithsonian Institution, waive the time and permit the contractor to finish the work within a reasonable period, to be determined by the said Superintendent of Construction. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual (82) loss and damages to the United States due to the delay

beyond the time originally set for completion shall be determined by the said Superintendent of Construction, and deducted from any payments due or to become due to the contractor: Provided, however, That the party of the first part may, with the prior sanction of the said Regents, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the Superintendent of Construction may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided, further, That nothing in these general conditions shall affect the power of the party of the first part to annul the contract as provided in its form.

11. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

PROPOSAL FOR CUT GRANITE, SOUTH PAVILION.

(83)

October 13, 1906.

To Mr. Bernard R. Green,
Superintendent of Construction,
Office of Building and Grounds, Library of Congress,
Washington, D. C.

Sir:

In accordance with your advertisement of September 20, 1906, inviting Proposals for Cut Granite for the South Pavilion for the Building for the National Museum, in Washington, D. C., and subject to all the conditions and requirements thereof, and of your circular specifications and general instructions and conditions of the same date, copies of all of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or) I propose to furnish the granite work comprised in

Proposal No. 1 for one hundred and forty-nine thousand dollars ($149,000.00) (Bethel C).

Proposal No. 2 for twelve thousand six hundred and fifty dollars and forty cents ($12,650.40) (Bethel A).

Proposal No. 3 for thirty-two thousand one hundred and ninety-five dollars ($32,195.00) (Bethel B).

Proposal No. 4 for seventeen thousand six hundred fifty-seven dollars and eighty-five cents ($17,657.85) (Milford A).

Proposal No. 5 for forty-four thousand four hundred and twenty-nine dollars and ten cents ($44,429.10) (Milford B).

We (or) I make this proposal with a full knowledge of (84) the kind, quantity and quality of the articles required, and, if it is accepted within sixty (60) days from the date of opening of proposals therefor, will, within ten (10) days after receiving written notice of such acceptance, enter into contract, with good and sufficient sureties, for the faithful performance thereof.

(Signature) FRANK F. GRAHAM.
(Address) Calhoun St. & B. & O. R. R.

(85) GUARANTY TO ACCOMPANY PROPOSAL.

We, The Title Guaranty & Surety Company, of Scranton, in the county of Lackawanna and State of Pennsylvania, and of , in the county of (a corporation existing under the laws of the) State of , hereby undertake that if the bid of Frank F. Graham herewith accompanying, dated October 13, 1906, for furnishing and delivering cut granite for the South Pavilion for the Building for the National Museum be accepted as to any or all of the items of supplies, materials, and services proposed to be furnished thereby, or as to any portion of the same, within sixty days from the date of the opening of proposals therefor, the said bidder Frank F. Graham will, within ten (10) days after notice of such acceptance, enter into a contract with the proper officer of the United States to furnish such articles of supplies and materials and such services of those proposed to be furnished by said bid as shall be accepted, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement inviting said proposals, and will give bonds with good and sufficient surety or sureties, as may be required, for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors and administrators, jointly and severally to pay to the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten (10) days after said notice of acceptance, the

(86) difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter amount be in excess of the former.

Given under our hands and seals this 13th day of October, nineteen hundred and six.

THE TITLE GUARANTY & SURETY CO.
By PHILLIP WALKER, [Seal]
By WILLIS PARKER,
Attorneys-in-fact.

In the presence of:
R. COCHRAN.

(87) CONTRACTOR'S BOND (PUBLIC WORKS).

(When principal is an individual or a partnership and surety is a corporation.)

Know all men by these presents, That We Frank F. Graham of Baltimore, Maryland, as principal, and The Title Guaranty & Surety Company, a corporation existing under the laws of the State of Pennsylvania, as surety, are held and bound unto the United States of America in the penal sum of fifty thousand dollars, to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, That whereas the above-bounden Frank F. Graham has, on the twenty-third day of October, 1906, entered into a contract with the United States, represented by Bernard R. Green, Superintendent of Construction, for cutting and delivering granite for the South Pavilion for the building for the National Museum, in Washington, D. C.

Now, therefore, if the above-bounden Frank F. Graham his heirs, executors, or administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Frank F. Graham to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the (88) United States as during the original term of the same,

and shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

In witness whereof, The parties hereto have executed this instrument this 26th day of October, 1906, the name and corporate seal of said surety being hereto affixed and these presents duly signed by its attorneys in fact, pursuant to a resolution of its Board of Directors, passed on the 3rd day of February, 1906, a copy of the record of which is on file in the office of the Judge Advocate General, War Department.

In presence of

LOUIS A. YOST, as to FRANK F. GRAHAM
STUART McNAMARA, as to THE TITLE GUARANTY & SURETY CO.

Attest:

Witnesses:

C. C. COCHRAN, By GEO. F. PARKER,
J. G. MacKNIGHT, By WILLIS PARKER, [Seal]
Attorneys-in-fact.

(Executed in duplicate.)

(89) ARTICLES OF AGREEMENT.

This Agreement, entered into this twenty-third day of October, nineteen hundred and six, between Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, of the State of Maryland, of the second part,

Witnesseth, that in conformity with the advertisement, specifications, instructions, and general conditions hereunto attached, which form a part of this contract, the said Bernard R. Green and the said Frank F. Graham, do covenant and agree, to and with each other, as follows:

The party of the second part shall transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first party free on board

cars at the quarry at Bethel, Vermont, required for that portion of the South Pavilion above the first floor level of the said building for the National Museum, in Washington, District of Columbia, described as part "C" in the said specifications, and do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions, all for the gross sum of one hundred forty-nine thousand dollars ($149,000.00), to be paid to the party of the second part in lawful money of the United States.

2. All materials furnished and work done under this con-
(90) tract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the Superintendent of Construction as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 12 of the attached general conditions.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Superintendent of Construction, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Regents of the Smithsonian Institution, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the
final completion and acceptance of the work herein stipulat-
(91) ed to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable

by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract or otherwise, in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, that the party of the first part may, (92) with the prior sanction of the Regents of the Smithsonian Institution, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons

for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Regents of the Smithsonian Institution: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the (93) obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Regents of the Smithsonian Institution.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or pro- (94) cess included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 41 of the general conditions hereto attached and forming part of this agreement.

12. Neither this contract or any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this con-

tract either with the transferer or the transferee, but all rights of action for any breach of this contract by said Frank F. Graham are reserved to the United States.

13. No Member of or Delegate to Congress is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

14. This contract shall be subject to approval of the Regents of the Smithsonian Institution.

In witness whereof the parties aforesaid have hereunto placed their hands, the date first hereinbefore written.

Witnesses:

JOHN O. SHEEHY, as to BERNARD R. GREEN
Superintendent of Construction.
LOUIS A. YOST, as to FRANK F. GRAHAM.
C. C. COCHRAN, as to
as to

(Executed in triplicate.)

(95) Approved October 27, 1906, for the Regents of the Smithsonian Institution.

By R. RATHBUN,
Acting Secretary.

(96) Mr. HILL: We offer them in evidence. Take that contract and describe what you did under this contract. A. This is the first copy of the advertisement, dated September 20, 1906, for sealed proposals for cut granite for the building for the new National Museum, and then there is a specification for the carrying out of the proposed contract—this advertisement was inserted by myself as in charge of the construction, for proposals for the cutting of the granite and the delivering of it, for the National Museum building, for the south pavilion. The next sheets are the specifications for carrying out that work which is advertised for. The next sheets are the general instructions to govern the bidders and contractors. That is in a printed form. The next is a copy of the proposal that was accepted after being received under the advertisement mentioned, the proposal by Mr. Graham, a copy of that; next is the contractor's bond; which was Mr. Graham's bond with the Title Guaranty & Surety Company as sureties for

carrying out this contract, and the last is the Articles of Agreement or the contract itself, signed by myself on the part of the Government and by Frank F. Graham, the contractor.

Q. Were any plans submitted in connection with those papers? A. As a part of the advertisement and specifications that were issued and referred to in the contract that was executed, was a set of drawings consisting of nine sheets, numbered as given here.

Q. What were they called, what kind of plans were they? A. Well, they were the general plans of work which was to be done and which was specified. The character of the plans is named in the specifications.

Mr. Hill: We want to offer these plans in evidence.

(It is hereby agreed that copies of the said plans certified to by counsel for the three parties hereto may be used in any court in the hearing or argument of this case. The said plans are the nine sheets of drawings referred to in the first paragraph of the specifications.)

Q. Are those the copies of the plans? A. These are the copies of the plans.

Q. When were these plans furnished to Mr. Graham A. They were furnished originally to him for making his (97) proposal. I don't know just the date, but they were sent out in the process of the asking for plans by bidders.

Q. Before or after he made the bid? A. Before, of course that goes out for the information of the bidder in making up his proposal.

Q. Were these the plans upon which any one who obtained the contract for this portion "C" were to base their course plans? A. Yes, sir.

Q. And setting plans A. Yes.

Mr. Hill: I will now read portions of this contract to the jury.

Mr. Harley: I think you had better read it all first.

Mr. Hill: Very well, we will read the whole thing.

(Mr. Hill then read portions of the contract to the jury.)

Mr. Hill: Mr. Green, suppose you read this section "C"?

A. (Reading) "All of the granite work of the pavilion all around above the first floor level and above the adjacent

roofs and between the heavy lines of the existing work marked 'Line of Old Contract', "—those words are on the drawing—"excepting the parts in the third story marked 'Mount Airy Granite in other Contract'." That refers to another kind of granite not included in this contract.

Q. (Mr. Hill) Just explain to the jury that portion covered there. A. The work involved here, the portion referred to in this contract, is this south building which comprehends all this part here (indicating). These wings (indicating) have nothing to do with it, and neither has this (indicating). This finished stone is around here (indicating) and that is the same stone as this.

Q. (Mr. Harley) But that was not in this contract? A. No.

Mr. Harley: Then don't refer to that. Don't show that to the jury. It is right there, is it not?

The Witness: Yes, here (indicating) at the middle of that pilaster. Now, as this paragraph "C" reads, it states: "All of the granite work of the pavilion all around above the (98) first floor level"—which is this (indicating) "and above the adjacent roofs"—that means this here (indicating)—"and between the heavy lines of the existing work marked 'Line of Old Contract'"—you see here (indicating) on the drawing there is a line marked along here,—"excepting the parts in the third story marked 'Mount Airy Granite in other Contracts". That is so marked to distinguish that granite from the south pavilion; that is so as to confine this description to the part covered by the contract. Then it says: "See especially drawings No. 152 and 156."

Mr. McLanahan: Show that to the jury on the drawings.

The Witness: Here (indicating) is the heavy line drawn here, and this shows the line of demarcation (indicating) between what goes in the south pavilion and what is above or what is being built in the adjacent wings. That is information for the bidder and that shows what is the boundary line and what is included in this south pavilion. This is the heavy line here, and this (indicating) is the half of the pavilion and this the other half, they being symmetrical.

Mr. Hill: Suppose you read the rest.

A. Now, the next paragraph says:

"5. The granite stock for the whole of part "C" will from the quarry at Bethel, Vermont, from which the stone the first and second stories is now being taken, and it is posed to use the same granite in the remaining parts, "A" "B", of the South Pavilion work.

"It is, however, contemplated, but not to be decided u after the proposals are received, to use the Milford gran similar to that in the present basement story of the buildi for parts "A" and "B" of the stone work instead of the Bet granite.

"The necessary Bethel granite stock, in net dimensi blocks, is to be furnished to the Government by the pres contractor, free on board cars at the quarry in Bethel, rea for the contractor for the cutting of the granite to transpo it to his cutting yards for that purpose.

"Bidders for the Bethel granite work will therefore b on the basis and understanding that the granite, in net dime sion blocks,—one block for each separate pattern,—will be fu nished to them without unnecessary delay and without charg free on board cars at the quarry at Bethel, Vermont. An block or part of block so furnished and subsequently spoile (99) in the cutting or otherwise lost or used by the contrac or must be replaced at his own expense.

"Bidders for the Milford granite work will include th cost of the necessary work.

"6. Bids will therefore be submitted as follows:

"Proposal No. 1. For freighting, cutting, boxing, an delivering complete all of the Bethel granite required for par "C" of the pavilion, before October 1, 1907."

Q. (Mr. Hill) That is the only one of those five propo sals which refers to this contract, is not that so? Just look a proposals 1, 2, 3, 4 and 5. A. Yes.

Q. Now, which of those five refers to this contract? A. Proposal No. 1 as described here was for the part involved in the present contract under consideration.

Q. Now, read No. 7.

(Witness then read paragraph 7 and 8, and 9)

The Witness: This last clause of paragraph 9 referring to the setting plans does not apply.

Q. That last clause does not apply? A. No, sir.

Q. But what you have already read does apply? A. Yes, indeed.

(Witness then read paragraphs 10 and 11)

Q. (Mr. Hill.) You sa'd "black ink"; you meant "black paint", did you not? A. Yes.

(Witness then read paragraphs 12, 13, 14, 15, 16, 17 and 18.)

Q. (Mr. Hill) Paragraph 19 does not refer to this contract, does it? A. No, sir. That part (indicating) as to the retaining walls is not in the contract.

(The witness then read paragraphs 20, 21 and 22.)

Q. (Mr. Hill) Will you explain what as "entasis" is? A. It is a taper or slight swell used in the Corinthian columns, (100) ordinarily. You can notice it right across the way (indicating Courthouse) where there are a number of Ionic columns. That makes it look straight to the eye.

(The witness then read paragraphs 23 and 24.)

Q. (Mr. Hill) What is a bush hammer A. A tool used by the stonecutter, consisting of a number of chissels placed together on the stones so that when the blow is struck on the stone a number of lines occur, according to the number of chissels used, they are cut in the stone. Each of them is a piece of steel about an eighth of an inch thick, sharpened like a chissel edge and placed together so that when the blow is struck a number of parallel lines equal to the number of chisels are cut in the stone. We wished to produce a hand cut effect; we did not want the diamond cut appearance—what we wanted was a perfectly straight and smooth face.

Q. What is an "arrisses"? A. That would be the edge of the stone, just like the edge of this table (indicating). Every square cut stone has arisses on it; they are the edges of a square cut stone, no matter where it is. It is simply a stone-cutters' or architect's name for that edge. Edge would not mean the same as arris, but an arris is an edge, but an arris would hardly be a sharp edge; it is a square edge like the square edge of a board or a box or a table.

Q. What does the word "stunning" mean? A. It is the effect on the surface of a stone caused by the blow of a hammer upon it. If you are cutting near the edge and strike too

hard you will break the corner off. The corner or arris is the most tender part of the stone, but if you strike in the middle of the stone, it is not so easily damaged. That work must be carefully done so as to avoid any stunning, and to insure good permanent results, and therefore it is provided that the work should be done in such a way as to avoid stunning. "All bushing and pointing must be done with sharp tools." That gave finer cutting on the stone than dull tools. All these are specifications to insure the best class of work.

(The witness then read paragraphs 25 and 26.)

(101) Q. What are proper seats and washes? A. If a stone is to receive another stone on top of it, the wash is the slope to throw the water off. The water will run off if it rains on this slope, and if it is necessary to put another stone on top, a hump is left to put the other stone on. It means a seat for the other stone to sit on. The provision that "all moulded work will be accurately profiled, cut to dimensions and jointed as shown on the drawings and by such details and models as will be furnished to the contractor by the Superintendent of Construction", means that the moulded work should show a true outline of the moulding, to have the mouldings properlly profiled, such as the cornice around the room, etc. If you sawed your head right in two vertically you would have a profile left there like the Profile Mountain in Washington, a profile in the rock of a man's head. When you talk of the profile of a man's face, you know what means, and the profile of the moulding is the same thing, it being a section which shows a true outline of the moulding. This paragraph, No. 27, does not refer to this contract.

Q. Does any of that 27th section apply? A. No, I don't think it does.

Q. Will you read it over to yourself carefully?

(The witness then did as requested.)

A. No, this relates to the basement.

Q. Section 27th does not refer to this contract? A. No, sir.

Q. How about 28? A. No, that does not apply; that is also below this work; the work involved in this contract that we are referring to starts from here (indicating) where this first floor is here. There is a course of stone under that there (indicating) referred to as "A" or "B", but not "C".

(The witness then read Section 29.)

Q. (The COURT) Was there any carving to this work? A. Yes, sir; a little.

(The witness then read Sections 30 and 31.)

Q. (Mr. HILL) Will you explain what caps on the col-
(102) umns and the pilasters are there? A. Yes, sir; they are these ornamental heads or caps for the columns (indicating). There is the large door with the ornament on the head of it which has some carving on each side which is included with these capitals and were not part of Mr. Graham's contract. He was only to rough it out and not complete the work.

Q. Was that to be done before or after it was placed in position? A. Well, we had not determined that; it was rather expected to be done before, and that is what we did do. The heavy cut stone was furnished by Mr. Graham at the building and the carving done there afterwards before the stone was set.

(The witness then read Section 32.)

Q. What does "free from large plug holes" mean? A. One of the tools used in facing stone is a plug hole, which is used in case you want to drill out a piece. It is called plug because you put a plug in there with feathers around it, and that is the way granite is roughed out, part of it done in quarrying and part in cutting and if they plug t a little too deep they may carry the hole in the stone too far and it would go beyond the face of the stone, make a hole in it. Some of that is not objectionable, but it must be superintended and examined to see just how much is to be permitted. The axe is to be freely used. That means you want the surface solid full and not full of holes and gouges; a hole there in the block can not be filled. You can cut stone away, but you can't fill it up after it has been cut too deeply, so you must be very careful in cutting down stone so that you do not strike too hard, or rather plug out pieces too deep. The axe used by the stonecutter has two faces, cut wedge shaped; there is a straight edge here (indicating) and one edge rather sharp and that is used to cut down, as you use a broad axe on wood. A stone axe is a blunted tool, very hard steel, capable of doing good execution even on granite and that is why it is called a granite axe. By using the granite axe, you can chip off smaller pieces of the stone than you can by drilling or using a feather plug.

Q. What is a bed joint? A. This is the bottom joint
(103) on which the stone rests. It says "particular care must be exercised in the cutting that all the joints shall be

exact and uniform". You don't want a joint half an inch wide at one end and more than that at another end. "All joints must be fine cut and full within three inches (3") of the faces of the stones and axed full for at least three-quarters of the bed and one-half of the build and end joints, the fullness properly distributed and no deep or wide plug holes or cavities." That description is for the purpose of limiting, as far as language could, the roughness so that the joints may be permitted the minimum of plug holes and to have enough of the face of the joint or bed of the stone nearly full to receive the mortar and not too much of it gouged out.

(The witness then read Section 33.)

Q. What is a false joint? A. In a course of stone it may happen to be more convenient to, instead of making two joints, to make a false joint all around it and point it up with mortar so that a layman and perhaps sometimes even a stonecutter would think it was a real joint. We have tricks in stonecutting as well as in other trades.

(The witness then read Section 34.)

The WITNESS: "Every stone must be cut of wind". That means that it must not be twisted but must be perfectly straight. Take a piece of paper and put it in wind that way (indicating) as the stonecutters say. It is to be "die square", that is, all the vertical corners are to be die square, which means truly a square, a square as a die.

(The witness then read Section 35.)

Q. What are "lewis holes"? A. They are holes put into the top of the stone. A lewis hole is an ordinary hole drilled in the stone and then you put a plug into that; it is bigger at the bottom than at the top and it can notpull out unless it pulls the stone with it, and by having it deep enough and strong enough, you can lift any kind of stone you choose that way. That is called a lewis hole.

(The witness then read Section 36.)

The WITNESS: (reading) "The several courses of stone (104) must be promptly completed and delivered for the natural course of building so that construction may proceed regularly in proper order". That means that we would rather have the bottom stone first than the top one, because it is more

convenient to build from the bottom up rather than from the chimney or roof down.

Q. (Mr. HILL) How long have you been in the stone business, as a matter of fact? A. Well, I guess you can say about 44 years—I went at it in '63, so it is more than that, it is 47 years.

Q. Tell us some of the buildings that have been under your superintendence in Washington and elsewhere? A. Well, I began as a young man on fortifications, immediately upon granite work. The first drawing I ever made as a youngster was a drawing of a granite stone wall, and I have been at it ever since. In Washington, I built some of the largest buildings there, the Army and Navy Building, which is granite throughout, the Public Library Building, which is granite—

Q. That is the Congressional Library? A. No, the Public Library, and I built the Congressional Library, which is also in granite, and I also tried the National Museum.

Q. Any monuments or anything of that sort? A. Well, I had a hand in building the Washington Monument.

Q. In Washington? A. Yes, sir; I have been at it all my life, at the quarries, etc., so that I feel quite at home in the granite business.

Q. There is another little note which I would like you to read? A. Yes, the last line says, "Read the General Instructions and Conditions herewith", and then follows the General Instructions and Conditions to Govern Bidders and Contractors; that is as to how to make bids and execute the contract and the general conditions under which the work will be managed.

Q. Now, all these general instructions and directions, whenever they are applicable, they apply to this contract, do they not? A. Yes, sir.

Mr. HARLEY: The contract says that.

The WITNESS: After that is a copy of the proposal for cut granite, south pavilion; that is in a printed blank form.

(105) Mr. HARLEY: I understand that the whole thing is in evidence.

Mr. HILL: Yes, but we are just going over this to explain anything which may need explanation.

Q. If you will turn to the proposal for cut granite on the south pavilion, you will see that there were five proposals made? A. Yes, sir.

Q. Please state which of these, if any, apply to this contract? A. Oh, these (indicating) are the proposals made by Mr. Graham.

Mr. HILL: Yes, I want to know which of these, if any, were accepted.

The WITNESS: There are five different proposals here, and Proposal No. 1 is for $149,000 in Bethel granite, and that is the only one which relates to this contract.

Q. That was accepted? A. Yes, sir; that was accepted.

Mr. HILL: I will now read the salient facts of the remaining portions of the contract. All of these papers (indicating) were, by the contract, made a portion of the contract.

(Mr. Hill then read the Articles of Agreement.)

Q. Section 2 of the Articles of Agreement refers to the Superintendent of Construction. Who was the Superintendent of Construction? A. Myself.

Mr. HILL: I will also read the contractor's bond.

(Mr. Hill then read paper fererred to.)

The COURT: Gentlemen, we will take a recess for three-quarters of an hour.

After Recess.

BERNARD R. GREEN, resumed the stand for a continuation of direct examination and testified as follows:

Q. (Mr. HILL) Mr. Green, in the Articles of Agreement it is stated that you made the agreement as Superintendent of Construction acting under the direction of the Regents of the (106) Smithsonian Institution. Why was that put in there and did you act under that direction?

Mr. HARLEY: Objected to.

Mr. HILL: On what ground?

TORN PAGES

Mr. HARLEY: It is highly improper to ask any witness such a question.

The COURT: The objection is overruled.

To the propounding of which question, the defendants, and each of them, then and there objected; but the court overruled said objection and permitted the witness to answer said question.

Mr. HARLEY: Note exceptions for each of the defendants.

A. It was put in there for propriety. I was in charge of the construction of the Museum under the law, but as the building was being erected for the purpose of the new National Museum, under the management, practically, of the Regents of the Smithsonian Institution—as the Museum has always been under their management and still is and was at that time—as a matter of courtesy, as the law did not specify particularly what my relations to the Institution would be, I naturally supplied the deficiency by assuming that the building should be constructed as the Regents of the Smithsonian Institution who were in charge of the Museum desired it to be. It was not my desire to go on and construct the National Museum without consulting the wishes of the Regents, as the law did not specify the details, and I wanted to build the Building in conformance with their wishes as far as I could do it. I had no reason to feel and have none since that I should go in any way contrary to the wishes and desires of the Regents of the Smithsonian Institution in this matter. That was why that was put into the contracts and their approval obtained to all the contracts which really covered most of the proceedings towards the construction of the building.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their first bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Second Bill of Exceptions.

(107)

After the matters set forth in the defendants' first bill of exceptions, all of which are hereby incorporated in and made a part of this, their second bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

Q. (Mr. HILL) Will you look at these certified copies of letters here which have been produced under order of court, the first one from you to Mr. Richard Rathbun, acting secretary of the Smithsonian Institution under date of October 19, 1906; letter from Mr. Rathbun, acting secretary, to you, October 20, 1906; letter from you to Rathbun, October 27, and letter from Rathbun to you October 27—the same day—in reference to that contract. Will you look at those letters, read them to the jury, and say whether you wrote them and received these answers.

The said letters are as follows:

BUILDING FOR THE NATIONAL MUSEUM

Office of
Bernard R. Green, Superintendent of Construction,
Library of Congress, Washington, D. C.

October 19, 1906.

Mr. Richard Rathbun,
Acting Secretary, Smithsonian Institution,
Washington D. C.

Sir:

(108) I have the honor to submit the enclosed abstract of proposals, received in pursuance of advertisement of September 20, 1906, and opened on the 13th instant, for furnishing the cut granite work for the south pavilion of the National Museum Building.

The proposal of Frank E. Graham, of Baltimore, Md., for cutting and delivering the Bethel white granite for portion "C" of the work, or the whole of the pavilion above the first floor level, is reasonable and the bidder has the facilities for doing the work properly. I therefore recommend the award of the contract for that part of the work to him at the amount of his bid, $149,000.

Recommendations as to proposals for other parts of the work will be made as soon as the quarries and facilities of the lower bidders can be looked into.

A full set of the plans and copies of the specifications, instructions and general conditions, and blank form of proposal issued for the receipt of the bids are enclosed herewith for your information.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

SMITHSONIAN INSTITUTION,
Washington, D. C.

October 20, 1906.

Sir:

I approve, on behalf of the Regents, your recommendation under date of October 19, that the contract for cutting and delivering the Bethel white granite for portion "C" of the granite work for the South Pavilion of the new National Museum building, namely, the whole of the Pavilion above the first floor level, be awarded to Frank E. Graham, of Baltimore, Maryland, whose bid is in your judgment reasonable, and who you state has the facilities for doing the work properly, the contract price being one hundred and forty-nine thousand dollars ($149,000.00).

The set of plans and copies of specifications, instructions to bidders and form of proposal, transmitted with your letter, (109) will be placed on file in the Institution.

Very respectfully yours,

R. RATHBUN,
Acting Secretary.

Bernard R. Green, Esq.,
Superintendent of Construction,
Building for the National Museum,
Library of Congress, Washington, D. C.

BUILDING FOR THE NATIONAL MUSEUM

Office of
Bernard R. Green, Superintendent of Construction,
Library of Congress, Washington, D. C.

October 27, 1906.

Mr. Richard Rathbun,
Acting Secretary, Smithsonian Institution,
Washington D. C.

Sir:

I have the honor to submit herewith, for your approval on behalf of the Regents, triplicate copies of a contract enter

ed into by me on October 23, 1906, with Frank F. Graham, of Baltimore, Md., for cutting and delivering the Bethel white granite for the whole of the south pavilion above the first floor level of the new National Museum Building. The award of this contract received your approval under date of October 20, 1906.

Very respectfully yours,

BERNARD R. GREEN,
Superintendent of Construction.

SMITHSONIAN INSTITUTION,
Washington, D. C.

October 27, 1906.

Sir:

I have approved on behalf of the Board of Regents, and return to you herewith, triplicate copies, transmitted with your letter of October 27, of a contract entered into by you on October 23, 1906, with Frank F. Graham, of Baltimore, Maryland, for cutting and delivering the Bethel white granite for the whole of the South Pavilion above the first floor level, of the New National Museum building, in accordance with (110) the award approved under date of October 20, 1906, for the gross sum of $149,000.00.

Very respectfully yours,

R. RATHBUN,
Acting Secretary.

Bernard R. Green, Esq.,
Superintendent of Construction,
Building for the National Museum,
Library of Congress, Washington, D. C.

(The witness then read letter of October 19, 1906, from Mr. Green to Mr. Rathbun.)

A. I wrote this letter.

Q. You wrote that letter. A. Yes, sir.

Q. Now, read the next letter and see if that is one that you received. A. This (indicating) is the letter of October

20, 1906, from the Smithsonian Institution, R. Rathbun, Acting Secretary. I received this letter.

(The witness then read letter referred to.)

Mr. HILL: Now, take the next letter.

The WITNESS: The next letter is dated October 27, 1906, from Mr. Rathbun to me. I received that letter.

(The witness then read letter referred to.)

Mr. HILL: We offer those letters in evidence.

Q. I herewith hand you two letters which have been asked for by counsel for the defendant and produced in court dated March 18, 1908, from yourself to Doctor Charles D. Walcott, Secretary, Smithsonian Institution, and a letter from Doctor Walcott to you also dated March 18, 1908. Will you look at these letters and identify them?

The said letters are as follows:

BUILDING FOR THE NATIONAL MUSEUM

Office of
Bernard R. Green, Superintendent of Construction,
Library of Congress, Washington, D. C.

March 18, 1908.

Dr. Chas. D. Walcott,
Secretary, Smithsonian Institution,
Washington, D. C.

Sir:

(111) I have the honor to recommend, under the terms of the contract of October 23, 1906, with Frank S. Graham, of Baltimore, Maryland, for the cut granite for the south pavilion of the new National Museum building, the annulment of the said contract, and to ask the sanction of the Regents of the Smithsonian Institution thereof and that a letter, as per copy herewith enclosed, setting forth the facts be sent at once to the contractor and his surety, notifying them of the annulment of the contract.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

BUILDING FOR THE NATIONAL MUSEUM

Office of
Bernard R. Green, Superintendent of Construction,
Library of Congress, Washington, D. C.

March 18, 1908.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Maryland.

Sir:

As you have failed to prosecute faithfully and diligently the work in accordance with the specifications and requirements of your contract of October 23, 1906, for the cut granite required for the south pavilion, above the first floor level, of the building for the National Museum, in Washington, District of Columbia, and have recently stopped work on the said contract, you are hereby notified that the contract is annulled of this date, with the sanction of the Regents of the Smithsonian Institution, as provided for by its terms, and that further, in accordance with the said terms, the United States will proceed immediately to secure the performance of the work and delivery of the cut granite in accordance with law.

Under the existing circumstances and conditions, I suggest that it will be to the best interests of all parties concerned if the United States may take immediate possession of the ground, materials and equipment lately occupied and used by you for the performance of this contract and to keep and use the same for such time as may be necessary to complete the said contract, as provided for by its terms.

Owing to the interdependence of other contracts with this, especially that for supplying the granite stock, you will appreciate the importance of immediate reply and the making of the necessary arrangements for the continuance of the work by the United States, as above proposed.

A copy of this letter has been forwarded to your alleged attorney, Harry E. Schorf, and to the Title Guaranty & Surety Co., your surety on the contract.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

SMITHSONIAN INSTITUTION,
Washington, U. S. A.

(112)
Sir: March 18, 1908.

I have your letter of March 18, and hereby approve on behalf of the Board of Regents, the annulment of the contract dated October 23, 1906, with Frank F Graham, of Baltimore, Maryland, for the cut granite for the south pavilion of the new National Museum Building, and authorize you to address at once a letter, in the terms suggested to you, to the contractor, and his surety, the Title Guaranty & Surety Co., notifying them of the annulment of the contract. You will take such steps as may be necessary to provide for the delivery of the remainder of the cut granite required for the south pavilion above the first floor level of the building.

Very respectfully yours,

CHAS. D. WALCOTT,
Secretary.

Bernard R. Green, Esq.,
Superintendent of Construction,
Building for the National Museum,
Library of Congress, Washington, D. C.

A. I wrote this letter and received this letter (indicating.)

Mr. MCLANAHAN: These relate to the annulment of the contract, and while we want to offer them later, we only want to have them identified now so that these gentlemen can testify and go home.

The COURT: They are just identified, now.

Mr. HILL: Yes, sir.

Q. (Mr. HILL) As I understand it, you can identify all these letters (indicating) as having been written or received by you? A. Yes, sir.

Mr. HILL: With permission of the counsel on the other side, we wish to withdraw Mr. Green and place on the stand Mr. Rathbun and Doctor Walcott.

The COURT: Very well.

(Examination suspended.)

(113) RICHARD RATHBUN, a witness of full age, having been duly sworn, testified as follows:

Q. (Mr. McLANAHAN) What position do you occupy, sir? A. I am the Assistant Secretary of the Smithsonian Institution.

Q. How long have you occupied that position? A. Since about the first of February, 1897.

Q. Mr. Rathbun, will you state just what the Smithsonian Institution is?

Mr. HARLEY: I think the Acts of Congress tell that.

The COURT: Is that material to the issue?

Mr. McLANAHAN: It is not a very material point, but we would like the jury to understand what sort of an organization we are dealing with.

Q. (The COURT) Can you state what it is A. I am prepared to state, not as my opinion, but from the laws of Congress.

Mr. HILL: We are not asking for the legal construction, but just what the practical operation of the institution is?

The COURT: The Act of Congress authorizes the Smithsonian Institution in the manner prescribed in this law to construct this building?

Mr. McLANAHAN: The Act of Congress that authorized Mr. Green to erect this building does not bring the Smithsonian people in to the matter at all, but as Mr. Green said in his testimony, as this building was being built, for the Regents of the Smithsonian Institution he thought that they should be considered and that he should be guided by their wishes.

Q. (The COURT) For what was this building being erected? A. The building, your Honor, was erected for the National Museum, which is a branch of the Government administered under the Smithsonian Institution.

The COURT: What is what you wanted?

Mr. McLANAHAN: Yes, sir.

Q. Mr. Rathbun, did the Regents of the Smithsonian Institution approve the awarding of this contract to Mr. Gra-
(114) ham? A. They did.

Q. Now, will you just state how this approval was made and what the approval of the Smithsonian Institution means?

Mr. HARLEY: Objected to.

To the propounding of which question, the defendants, and each of them, then and there objected; but the court overruled said objection and permitted the witness to answer said question.

(Objection overruled; exception noted for each defendant.)

A. The approval was made by the Secretary of the Smithsonian Institution, or by the Acting Secretary, who, by law, is given the same authority in his absence. The answer to the latter part of the question is simply this, that the Secretary of the Smithsonian Institution is actually or virtually the director of the Smithsonian Institution—I am not giving this as a matter of opinion, I would like to say, but as something which is contained in documents of the Government. It is printed in statutes among the Acts of Congress, and I am not giving it as my opinion at all, but a reference to the documents will show the Secretary of the Institution—

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their second bill of exceptions, which is accordingly done, this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Third Bill of Exceptions.

(115)

After the matters set forth in the defendant's aforegoing bills of exceptions all of which are hereby incorporated in and made a part of this, their third bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

Q. (Mr. HILL) You are referring to the documents of the Smithsonian Institution, aren't you?

(Objected to.)

To the propounding of which question the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to answer said question.

(Objection overruled; exceptions noted.)

A. The Secretary is given entire authority to plan and conduct the operations of the Smithsonian Institution by resolution of the Board of Regents, which is repeated every year. It is only subsequently that the accounts are examined by the Board of Regents or the Executive Committee.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their third bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Fourth Bill of Exceptions.

(116)

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their fourth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

Q. (Mr. McLANAHAN) Then, as I understand you (the same witness), all the matters of detail are handled by the Secretary or Acting Secretary as directed? A. Yes.

Q. How long has that been the custom to your knowledge?

Mr. HARLEY: We object to that.

Mr. McLANAHAN: I will withdraw the question.

Q. Is that the custom? A. It is the custom, and it has been the custom for many years.

Q. How long has that been the custom to your knowledge? A. The form of resolution which gives this authority, the actual wording of this form was started in 1894.

Q. Mr. Rathbun, did you receive this letter dated October 19, 1906, from Mr. Green, which Mr. Green read to the jury a few minutes ago? (Handing letter to the witness.)

Note: The letter here referred to has been hereinbefore inserted.

Mr. Harley: That is already in evidence.

A. I received this letter.

Q. Did you write the letter in reply thereto which Mr. Green has read to the jury, dated October 20, 1906?

Note: The letter here referred to has been hereinbefore inserted.

A. I signed that letter.

Q. And did you receive this letter (indicating) of October 27, 1906, from Mr. Green?

Note: The letter here referred to has been hereinbefore inserted.

A. Yes, sir.

(117) Q. And did you write the answer to that letter of October 27, 1906?

Note: The letter here referred to has been hereinbefore inserted.

A. Yes, sir.

(No cross-examination.)

(Examination concluded.)

Doctor Charles D. Walcott, a witness of full age, having been duly sworn, testified as follows:

Q. (Mr. McLanahan) Will you kindly state to the jury what your position is? A. Secretary to the Smithsonian Institution.

Q. How long have you been Secretary? A. Since February 1, 1907.

Q. Did you receive this letter dated March 18, 1908, from Mr. Bernard R. Green?

NOTE: The letter here referred to has been hereinbefore inserted.

A. I did.

Mr. McLANAHAN: I offer this letter in evidence.

Q. Did you write the reply to that letter under date of March 18, 1908, which bears your signature?

NOTE: The letter here referred to has been hereinbefore inserted

A. Yes, sir.

Mr. McLANAHAN: I offer this letter in evidence.

Q. Did you receive this enclosure in the letter which you received from Mr. Bernard R. Green, of March 18, 1908, which I now hand you?

NOTE: Said enclosure here referred to has been hereinbefore inserted.

A. The letter to Mr. Frank F. Graham from Mr. Green—yes, sir.

Mr. HILL: We offer all of these letters that have been identified by the witnesses.

(Mr. Hill then read to the jury the letter dated March 18, 1908, to Doctor Walcott from Mr. Green, and the letter of March 18, 1908, to Mr. Green from Doctor Walcott; also (118) the enclosure contained in the letter from Mr. Green to Doctor Walcott of March 18, 1908.)

Q. (Mr. McLANAHAN) Doctor Walcott, who is Mr. Rathbun who has just testified? A. He is the Assistant Secretary of the Smithsonian Institution.

Q. In your absence, how does he act. A. He is the Acting Secretary.

Q. Under what authority did you sign this letter of March 18, 1908, in which you approved the annulment of the contract?

(Objected to.)

To the propounding of which question, the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to answer the said question.

(Objection over-ruled; exceptions noted.)

A. Under the authority—I don't recall the Acts by which the authority is granted—but it has been the general custom and practice—for the Secretary to approve of all contracts, agreements and matters relating thereto in connection not only with the construction of the present National Museum building, but also of other similar matters which may have come up from time to time.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their fourth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Fifth Bill of Exceptions.

(119)

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their fifth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

Q. (Mr. McLANAHAN) How old is this custom, if you know.

(Objected to.)

To the propounding of which question, the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to answer the said question.

(Objection overruled; exceptions noted.)

A. My personal recollection is that it dates back to about 1856.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their fifth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Sixth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their sixth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

Q. Is it or not the custom for the Regents to sanction from (120) from time to time the acts of the Secretary?

Mr. HARLEY: Objected to as leading and for other reasons.

The COURT: I sustain the objection.

Q. (Mr. McLANAHAN) Doctor Walcott, who makes the contracts for supplies for the Smithsonian Institution.

Mr. HARLEY: Objected to.

The COURT: What kind of supplies?

Mr. McLANAHAN: General supplies for the Institution.

(After argument.)

The COURT: What was the last question

(The last question was then read by the stenographer.)

The COURT: I don't think that is pertinent, I sustain the objection.

Q. (Mr. McLANAHAN) Doctor Walcott, this contract shows that the Board of Regents approved this contract and the correspondence shows that the contract was annulled with

the sanction of the Board of Regents. Was the action, so far as the Board of Regents was concerned, the same in both cases, both with the approval and annulment of the contract? In other words, did you go through the same proceedings? A. Yes sir.

Cross Examination.

Q. (Mr. Harley) Was there any meeting of the Board of Regents, Doctor, in the month of March, 1908? Or, I will change that: Was there any meeting of the Board to pass upon this matter to which you referred in your letter of March 18, 1908, to Superintendent Green? A. No, sir.

Q. You never had any special authority to act in this particular case? A. No, sir.

Q. This matter had never been brought specifically to the attention of the Board of Regents at any time? A. At the December meeting in 1908—no, 1907—I beg your pardon, I think it was at the January meeting of 1908, I explained to the Regents that the building was proceeding slowly on account of non-delivery of granite and the cutting of granite, but there was nothing said specifically in relation to this contract.

(121) Q. Now, this letter of March 18, from Mr. Green reached you on the same day, that is, March 18? A. I presume it must have done so. Very often those letters come in the morning mail and are attended to during the day.

Q. The only information you had about the subject matter of this letter was what Mr. Green said in this letter? A. No, sir; I had had previous conversations with Mr. Green about the matter.

Q. But you acted upon this letter of that date? A. I acted on that letter and on the information I had already had given to me verbally by Mr. Green.

Q. When was that information given to you verbally by Mr. Green? A. Oh, from time to time when I met him, and he also called at the office and explained the matter to me.

Q. When? A. Prior to that time.

Q. How long? A. I don't know; I can't recall.

Q. A week? A. It may have been, or it may have been a day before or sometime before.

Q. Ten days? A. Maybe.

Q. Mr. Green was out of the city a great deal during the summer of 1907, wasn't he? A. But this was in March, 1908.

Q. But I am asking you about 1907?

(Objected to.)

RE-DIRECT EXAMINATION.

Q. (Mr. McLANAHAN) Mr. Harley asked you about when Mr. Green saw you with regard to this annulment of the contract. Will you state whether or not Mr. Green saw you after Mr. Graham had thrown up the contract? A. Mr. Green told me that the contract had been thrown up by Mr. Graham prior (122) to my receiving that letter.

BERNARD R. GREEN, a witness heretofore produced and sworn on behalf of the Government, resumed the stand for a continuation of direct examination and testified as follows:

DIRECT EXAMINATION CONTINUED.

Q. (Mr. HILL) Will you look at the ninth section of the specifications and explain fully to the gentlemen of the jury what those setting plans mean that were to be prepared by the contractor, and what part, if any, they played in the progress of the work? A. This is the section which relates to the setting plans so-called to be prepared by the contractor before any of the work could proceed. Those setting plans or detail plans for quarrying and dressing stone were to be based upon the original plans which were part of the contract and already exhibited here. Those plans show all the details taken in conjunction with the specifications, all the details of the work to be done. They show the dimensions and size of the building and all that, and they show where every stone is in the building, but they can not be used just as they are in the preparation of the stone. In order to quarry and dress the stone the other details of each of the stones, which are not represented fully, must be laid out on another set of plans which show in complete detail every little fraction of any inch and every little shape of the stones, and there are a multitude of those varieties, and all that must be set out on these plans so that every single stone is represented in all its details as well as its general character, so that it can be understood by the stonecutters, the men who dress the stone, and that is what is meant by the setting plans. The plans necessary were required to be prepared by the contractor himself, according to the contract, and then sent to our office. That is the setting plans described here. They are to be made on a particular scale. We specified the scale so that the contractor would not make it too small to be of practical use, and we specified that it should be of one-quarter of an inch to the foot—that is, every quarter of an inch would be equal to a foot on the plan itself. That made it of a size for practical use. Now, those plans, when properly made,

generally show each seperate course. There is a plan for each (123) course, or as near that as necessary to get all the details. If the courses are simple there may be two or three courses represented on one sheet. The plans have to be of a size that will be capable of use and everything is set out so that it can all be seen. Those plans have to be made with great care and accuracy, and that was required to be done by the contractor, rather than be done for him by the Government, in order that he should become in that way sufficiently familiar with the details of the work which he was to do, so he contracted to make those plans himself and submit them for approval so that we would have time to go over those plans before any work was undertaken under them.

Q. Could any stone be quarried before those plans were approved by your office? A. Practically not; that is, they would be taking a risk, and that risk the Government would not take.

Q. Mr. Green, look at this copy of the letter from you to Graham of October 20, 1906?

Mr. HARLEY: This was before the contract, and we object to anything before the contract.

The COURT: I will take it subject to exception.

The letter is as follows:

BUILDING FOR THE NATIONAL MUSEUM.

(124)

Office, Superintendent of Construction,
Library of Congress,

Washington, D. C., October 20, 1906.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

I have recommended to the Regents of the Smithsonian Institution the award to you of the contract for cutting and delivering the granite above the first floor level of the south pavilion of the National Museum building for the sum of $149,000.00, in accordance with your competitive proposal of the 13th instant. The approval of the Regents is expected to be received without delay.

In the meantime, however, it is very important that you should enter upon the vigorous preparation of the setting plans

of the work for the examination of the Architects and my approval. In making the plans I think it best to adhere to the same designations of courses by letters which appear in the Architects' plans. As to the numbering, it seems to be best to make one series for each course from left to right as you face the building. The drawings should be on tracing cloth this time, instead of paper which you used for the court yards. The scale of the plans should be $\frac{1}{2}$" to the foot, and they should consist of elevations and a plan, of each course in full, not a perspective or isometric representation such as you used in the courts.

Make the figures clear and distinct and not too many of (125) them, but enough to show the different dimensions, projections etc. The Architects are rapidly preparing the full size details now, so that I anticipate no delay in your getting to work after the first shipment of stock is received from the quarry. The setting plans will have to be used by the quarry contractor and the inspector who will be employed there to see that the stock is properly gotten out to furnish the requisite patterns.

You see, therefore, that the prompt starting of the work at your cutting yards will depend on the early preparation of the setting plans.

These plans should also be made for the upper parts of the work very early as well as the lower parts, so as to aid in the quarrying of the larger and more difficult stones considerably in advance of the time when needed, because the quarry is in irregular and thin sheets, and it cannot be expected to furnish large stones at short notice. They will have to be looked for in advance. In general it will of course be necessary to favor the quarry contractor to enable him to get out stones as rapidly or as much in advance as he may desire and so avoid any excuse for delay on his part. The Thompson-Starrett Co. have much quarrying to do at the same time to complete their present contract for the building.

I am just enclosing herewith an order to you for the court yard chimney tops, and hope you will at once submit the setting plans therefor and turn this work out as fast as possible that we may close out your court yard contract as soon as possible.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

(126) Mr. McLANAHAN: Read it to the jury.

The WITNESS: This (indicating) is a letter which I wrote to Mr. Graham on October 20, 1906.

The COURT: When was the contract signed?

Mr. MCLANAHAN: The 23rd.

(The witness then read the letter referred to.)

The WITNESS: It was important that he should enter upon a preparation of those plans, and I called his attention to it. I called his attention also to the manner in which the drawings were to be prepared. This last paragraph in the letter does not relate to anything in this contract.

Q. You wrote that letter? A. Yes, sir.

Q. Now, in this letter you said to Graham that he should "enter upon the vigorous preparation of the setting plans of the work". Did he do this? A. He did not.

Q. He did not? A. No, that is, he did not produce the plans. I don't know about how vigorously he thought he was working.

Q. In your experience under contracts of this kind, how soon should you have had the setting plans submitted to you? A. Within two months, the whole set—that is, all the plans.

Q. How did Graham actually furnish you these setting plans required under the contract? A. The first ones—one or two or three, perhaps, were not furnished, I am quite sure, before a month or something like that after the contract was entered into, and then they had to be corrected and examined carefully, and they were not properly made; therefore, to took more time to correct them and put them in proper shape and send them back for correction, so I don't think we had the first two or three plans for two months. I don't know the dates. It is a matter of record.

Mr. HILL: We have notified the other side to produce, and they have produced the first setting plans, which we here (127) offer in evidence.

Q. In your letter to Mr. Graham, which is offered in evidence, you make certain statements as to how the plans should be prepared. Is that plan prepared in accordance with your directions A. It is not.

Q. Explain to the jury in what way it is not? A. I particularly desired to explain to Mr. Graham that the course plans

should be laid out in elevation and a plan of each course in full, and not a perspective or isometric plan such as this is (indicating). This is an isometric representation showing the stones in an awkward way. It is not best to do it this way. This represents three courses marked A, B and C, that is, with stones on this course (indicating) and on this. That is all done in isometric representation. That shows two or three sides instead of the face, and it is more difficult to study out to make sure that he has got all the mistakes. Therefore it adds to the time necessary to examine the plans to guard against mistakes. This was not at all in accordance with my request and suggestion made to him as to how to make the plans before he had started to make any of them. That was the old fashioned way which he had practiced before and of which I did not approve, and was contrary to my suggestion, which if he had carried out would have been to his advantage, less work for him, and less work for us.

Q. Can you tell from any marks on this plat (indicating) when it was received by your office from Mr. Graham? A. By this rubber stamp down here in the corner (indicating), it marked "1906"—well, it was returned from the architects December 14, and the other stamp should show when it was submitted to us by Mr. Graham.

Q. Which stamp should show that? A. This one down here in the corner (indicating.)

Q. That was December of what year? A. 1906, so it came to us before that. That rubber stamp there is somewhat faded. With a good magnifying glass you might make that (128) out.

Q. (Mr. Hill.) Just tell us when you received this. Look at those various marks and explain what they mean and say if there is any stamp on here which shows when your office received this for the first time from Mr. Graham? A. As far as I can make out, that was received December 8, 1906, from Mr. Graham. That is one mark. There is another stamp that shows it was received back from the architects on December 14, they having checked it up and returned it to me. Then it was sent again to Mr. Graham or received from Mr. Graham, it having been sent to him for proper corrections. It was received back from Mr. Graham, December 18 and forwarded again to the architects for them to see if it was correct, and then received back from them on December something—it is rather indistinct—but it must have been after December 18 or 19 which is the time when it was received from Mr. Graham. After coming back from the architects, it was then sent to Mr. Graham again. That course of procedure was fol-

lowed all the way through with all his plans, they went back and forth to the architects and then went from me to Mr. Graham for him to go on with, and it was not until he then received it at that time from me that he could go ahead with the cutting.

Mr. Hill: Your Honor, by agreement with my brother on the other side we are formally offering in evidence Plaintiff's Exhibit No. 4, this photograph of the south pavilion of the National Museum Building taken in May of this year, just for purposes of explanation.

At the conclusion of the testimony yesterday afternoon, your Honor and gentlemen of the jury, Mr. Green had testified as to the date of the reception of the first of the setting plans which under the contract were to be prepared by the contractor, Mr. Graham, and we had offered that setting plan in evidence. I now offer in evidence drawing No. 2 of the setting plans.

(It is hereby agreed that copies of the said protograph of said south pavilion and said drawing No. 2 certified to by counsel for the three parties hereto may be used in any court in the hearing or argument of this case.)

Q. (Mr. Hill) I hand you this drawing, Mr. Green, drawing No. 2 of the setting plans. The ink, as the gentlemen of the jury will see, has faded, but by the use of a glass it is perfectly possible to read the date.

(129)

The Court: The plan you exhibited yesterday was the first one?

Mr. Hill: That was the first one. This is the second one of the setting plans.

Mr. Harley: In order to get it straight, I would like to have it identified by the letter of the course with it represents.

Mr. Hill: The plans are numbered, and we submit this as plan No. 2.

Mr. Harley: I understand that, but why not let the witness identify the courses on the plan?

Mr. Hill: That is all right. The plans themselves show that.

Mr. HARLEY: Just let him identify what courses are on each plan.

The COURT: He can do that when he comes to it. This is plan No. 2.

Mr. HILL: No. 2 setting plan, received from Mr. Graham.

By Mr. HILL:

Q. Will you look at that plan and tell the jury what time that was received by your office, as shown by the stamps? A. (After examining plan with glass) December 4, 1906.

Q. Now, there is another date of reception there. A. Yes, when it came back from the architects.

Q. What does that mean? A. The stamp showing the date this drawing was received by me from the contractor is December 4, 1906.

Q. Now there is another received stamp there. What does that mean and what does it state? A. There are three or four of them.

Q. I mean at your office. A. At our office.

Q. Yes. A. They are all at our office. Part of these stamps refer to the receipt of the drawing from Mr. Graham, and others from the architects. The first stamp on the plan is December 4, 1906, the date when the drawing was received from Mr. Graham by my office. It was sent to the architects and received back by them on December 14, 1906. It was (130) then returned to Mr. Graham and received back from him on December 18 of the same year, as I make out the stamp, and then submitted to the architects again and received back from them on December 20. This drawing No. 2 or plan No. 2 represents the bases of the columns and the drums of the shaft of the columns; some of the pieces that form the column. I do not know that there is any course mentioned on it.

Q. Mr. Green, there are on this the words in black ink "Drawing No. 2, South Pavilion", and under those in black letters, "December 13, 1906". A. Yes.

Q. Who put those on, do you know? A. Those were put on by the contractor, I think.

Q. They were put on by the contractor? A. Yes, sir.

Q. And do they show the receipt by your office? A. No, sir.

Q. Is that true with all the plans? A. That is true with all the plans. They are stamped with the date of the receipt. The date on the plan stamped in ink, there, is prob-

ably the date of the making of the plan, sometime during the process of the making.

(The plan here referred to was here exhibited to the jury.)

Mr. HILL: (To the jury) That was put on by the contractor, and it does not show anything at all.

Mr. HARLEY: Yes, it does.

Mr. HILL: What does it show?

Mr. HARLEY: The date of making.

Mr. HILL: The date of making.

Mr. HARLEY: Yes.

Mr. HILL: You have got to prove that.

Mr. HARLEY: Yes, we will show that.

Mr. HILL: It shows the date that it was put on, I suppose.

The WITNESS: It may not show even that. It may not show anything.

By Mr. HILL:

Q. I herewith hand you drawing No. 3 setting plan. Please look at the stamps on this plan and state when this was first (131) received from Mr. Graham. A. (After examination) This was received December 4, 1906.

Mr. GAITHER: Are you not going to prove everything that is on there?

Mr. HILL: We will prove generally what these stamps mean. We proved that yesterday, that the stamps were put on showing the receipt, and there is no use going into each one of them, because it takes a lot of time. If you want to ask a question about any one of them, you can do so.

Mr. GAITHER: I understand those are in evidence.

Mr. HILL: They are all in evidence.

Mr. GAITHER: And those on there represent what they say?

Mr. HILL: They represent what they stand for.

Mr. MCLANAHAN: I do not know about its being proven.

Mr. HILL: Yes, I asked about that. You can ask on cross-examination anything you desire to. We are asking on our case what is material to us.

Mr. GAITHER: You asked the witness only when this plan was first received from Mr. Graham.

Mr. HILL: All we are going to prove on the other plans is when they received them from Mr. Graham?

Mr. GAITHER: He stopped on that. You have stopped on asking him any questions except when they were received, as I understand?

Mr. HILL: We will prove all those things, because there is no question about that, you know.

Mr. GAITHER: I do not see why you should want to make an exception.

Mr. HILL: Simply to save time.

The WITNESS: Anybody can read them and see what they are.

Mr. HARLEY: I must insist, your Honor, that this witness address his remarks to the court or to the jury. He has no right to speak to the District attorney or anyone else.

The COURT: That is correct.

The WITNESS: All right. The first stamp on here is December 4, 1906, when the drawing was received by me from the contractor, Mr. Graham. Then it was forwarded to the architects and received back from them on December 14. Then it went to Mr. Graham and was received back from him, corrected as required. December 18, it appears to be. It is hard to read it. Then it was submitted to the architects again (132) and received back from them on December 20, as near as I can make it out.

By Mr. HILL:

Q. Now, under the legend—that is what you call a legend, is it not? (indicating) A. Yes, sir.

Q. Under the legend there is printed December 3. What does that mean? A. December 3?

Q. Yes. A. I do not know. It was on the drawing when it came to us from Mr. Graham like the other parts of the drawing. I do not know what it signified at all.

Q. I now hand you drawing No. 4, setting plans, and ask you to state from the stamps upon it when this drawing was received, when it went back to Mr. Graham for correction, if it was so sent back, and when it was finally approved by you. A. It was received by me from Mr. Graham on December 29, 1906, and it was received back from the architects or Mr. Graham I cannot tell which this is—the mark does not show *ppp* January 7, 1907. This means it came from Mr. Graham. That "GW means Graham.

Q. What does that other stamp mean, with the little "g" on it? A. It was received from Mr. Graham both times, the first time December 29, 1906, and next January 7, 1907.

Q. When was it finally approved and how is that approval shown? A. It was approved January 22, 1907, as shown by my own handwriting on the sheet in black ink.

Q. I now hand you setting plan No. 5. Please state the date of its reception by you from Mr. Graham, when it was sent back to Mr. Graham for correction, when it was returned to him if so sent back, and the date of its final approval? A. This drawing No. 5 was received first from Mr. Graham on December 29, 1906. It was returned to him for correction and sent back by him again and received on January 7, 1907. It was approved by me January 22, 1907, in my own handwriting. There is another stamp on here which indicates that it went back to Mr. Graham for correction after we had received it from him on January 7, and it was returned by him (133) on about January 20, approved by me on January 22, by my own signature in black ink on the sheet.

Q. That last stamp is up here (indicating on tracing). All those other stamps are in the corner? A. Yes.

(The sheet referred to was here exhibited to the jury.

By Mr. HILL:

Q. I now hand you setting plan No. 6, and ask you to please state the date of its reception by you from Mr. Graham and whether it was sent to Mr. Graham for correction and

when it was returned to him if it was sent back to him, and the date of its final approval? A. This setting plan No. 6 was received from Mr. Graham in my office February 5, 1907, and was received back from the architects on February 7.

The COURT: It was received from Mr. Graham?

The WITNESS: From the architects after being corrected.

The COURT: When was it first received from Mr. Graham?

The WITNESS: It was first received from Mr. Graham February 5 and sent to the architects immediately and they returned it, so that it was received on February 7, 1907.

By Mr. HILL:

Q. And when was it finally approved by you? A. It was approved February 9 and signed by my signature on the drawing in black ink.

Q. On that plat are the initials, in connection with one of the stamps "H. and M". What does that stand for? A. Hornblower and Marshall.

Q. Who were they? A. The architects of the building.

Q. I now hand you setting plan No. 7. Please examine this plan and state to the jury when it was first received from Mr. Graham and its subsequent history until the time of its approval?

(It is hereby agreed that the originals or copies of all the aforesaid setting plans and all the setting plans or copies thereof hereafter referred to in this record certified to by counsel for the three parties hereto may be used in any court in (134) the hearing or argument of this case.)

A. This drawing No. 7 was received from Mr. Graham on March 20, 1907. The architects examined it and returned it so that it was received on April 29, 1907. The architects returned it on June 29, 1907.

Mr. GAITHER: Who returned it?

A. (continuing) The architects returned it to my office June 29, 1907. I approved it finally on June 29, 1907. First it had to be re-examined, and I approved it first on May 20.

1907, and finally approved it on June 29, 1907. They later made a correction on that drawing, next fall, on August 20.

Mr. GAITHER: What was that date?

The WITNESS: August 20 we made a correction in it and informed the contractors of it.

Mr. GAITHER: How are you going to identify this?

Mr. HILL: By the marks on it.

Mr. GAITHER: You mean by the marks that are on it now?

Mr. HILL: Yes, by the marks that are on it now, all the stamps and all that sort of thing.

By Mr. HILL:

Q. I hand you herewith a blueprint with the legend "Drawing No. 7, South Pavilion, March 18, 1907". Kindly examine this blueprint with the stams on front and back, and state to the jury what connection it has, if any, with setting plan No. 7 heretofore offered in evidence? Just look it over carefully if you please.

(It is hereby agreed that copies of said blueprint certified to by counsel for the three parties hereto may be used in any court in the rearing or argument of this case.)

A. This blueprint is a buleprint from that original tracing. It contains numerous red pencil marks which have been on afterwards for various purposes.

Q. In whose handwriting are the notations on the face of the blueprint and can you say who made the corrections checked thereon? A. They are marks by the architect.

Q. What particular architect, can you state? A. I think (135) probably Mr. Harris, of the firm. I think so.

Q. Kindly look at the stamps on the back of the blue print you hold in your hand and state their significance? A. There are three stamps here. One of them represents the date on which the drawing was received from Hornblower & Marshall, the architects, May 24, 1907. The other stamp indicates or shows that the drawing was sent to Mr. Graham on the same date, May 24, 1907. The next stamp indicates that the drawing came back from Hornblower & Marshall, the architects, on

June 29. They evidently received it in the meantime, for some modification, some checking about some detail or other.

Q. You have said that one of the stamps on the back shows the time that this was sent to Mr. Graham? A. Yes.

Q. For what purpose was it sent to Mr. Graham, if you can state? A. For his use, under the contract.

Q. What do these red marks show on the face of the blueprint? A. On the face? These little checks indicate that the architect in going over the figures examining the plan, made little check marks as he passed along from one stone to another. Other figures represent little corrections or modifications.

Q. Corrections or modifications? A. Yes, sir.

Q. Who was making these corrections or modifications? A. The architect.

Q. They were corrections and modifications in what? A. In the dimensions of the stones; slight errors or fractions of an inch.

Q. In the setting plans? A. In the setting plans, yes sir. He made certain modifications.

Mr. GAITHER: Can you not let the witness testify without asking him direct questions like that?

Mr. HILL: I only do to expedite matters.

The WITNESS: I may say that there are more of them upon this plan than almost any other plan in the whole set, because it contains courses that were most complex and difficult (126) to arrange and detail for the information of the contractor. Some of the changes here were for his benefit. The stones were made smaller or made in two pieces instead of one, and it took considerable study and consideration for his benefit as well as the benefit of the work, to carry this through. The plan represents only comparatively few stones. There are only three courses in the whole building represented on it.

Q. Why were the changes in these stones made? A. Because the stones were very large and clumsy and difficult to handle.

Q. At whose request were they made? A. They were made at Mr. Graham's request, and favored by ourselves as soon as we looked into it further.

Q. Please point out to the jury what stones on there were so changed for the benefit of Mr. Graham, or I will modify that last question, and say, at the request of Mr. Graham? I ought not to say for his benefit.

Mr. HARLEY: Or that he wished it. May we ask whether that request by Mr. Graham was in writing?

Mr. HILL: I do not know.

Q. Now, will you answer that question? A. I can not say that the request came in writing. There was a general study going on over the whole subject of these difficult stones in these courses, and that is the reason that this sheet went back and forth between the architect and the contractor and myself several times.

Q. Will you talk to the jury, Mr. Green? A. (Continuing) As I said before, as the drawing indicates by numerous pencil marks on it, even by that if nothing more it is shown that there was a good deal of study put upon those stones represented in this plan. It was a difficult subject to work out, and the work was all done to simplify the work of the contractor as well as to make the work better generally for all concerned. I can not say that Mr. Graham particularly wished this. We did these things sometimes that were in fact for his benefit, but not particularly because of his benefit. We first considered the benefit in the building, what was necessary to (137) make the building as it should be, and we did everything we could, and subsequent study was given to some stones for that purpose, and incidentally it was for Mr. Graham's benefit as well as for the benefit of the building and all concerned. You asked what stones. The study was mostly given to these very big ones here on the corner. They are part of the rough stones, and part of the Corinthian capitals. We simply indicated, in going along—

Q. Kindly indicate to the jury in what part of the building these courses come, high up or low down? A. High up.

Q. Will you point out on this photograph where they come (handing witness Plaintiff's Exhibit 1)? A. Up here at the top of the columns (indicating), right in here (indicating). Those stones are the most difficult ones to handle. The capital of the column is ornamental, like the capitals on those columns on that building across the street, which you can see from here. These capitals are of a different style. Those capitals across the street are Ionic, and they have a scroll on them. These capitals are Corinthian, and the work on them is more difficult than that on those across the street. These stones are larger and the capitals are big and heavy, and are carved in the Corinthian style, the most difficult thing to do in granite that there is anywhere. To give you an idea how much work there is in a capital as carved, one of those capitals costs about $5,-

000. The thing is about seven feet square across the top, and four and a half feet high. They stand almost as high as your head and the thing is so broad across the top that you could not span it with your arms. I am a six footer and I can not do it.

Q. Where is this stone here (indicating on protograph)? A. That stone is behind that column, because the wall carries what are known as pilasters, and the pilasters stand just behind the columns. They are not visible from this point of view very well.

Q. Can you show the gentlemen of the jury on this protograph what a pilaster is? Explain it to them? A. The pi- (1338) laster is a flat piece engaged in the wall. This is a pilaster here (indicating on photograph), but it does not have an ornamental top. This is a pilaster and this is a pilaster (indicating on photograph). Now, right behind that column, and behind each of those two columns, at each end here there is a recess in the wall, and behind that there is a pilaster corresponding to the column, a column of the same heighth, fluted and ornamental in the same way, and it has a granite capital on top of it. There are probably things of that kind in this building across the way. That represents in these courses the most difficult stones, and it is a matter of most careful study and consideration to get them out of the quarry, and out of the stonecutter's yard. The stonecutter has not much to do on those. They are big stones, hard to handle. The work of the contractor was to rough them out so that the carver could get at them. He had no carving to do on them at all. He roughed them out and got them into shape for the carver and when they got to Washington the carver would get to work on them and spend three or four months on each one.

Q. Did Mr. Graham have any carving to do there? A. He did not have on that, not on the capitals nor on anything represented on that plan.

Q. What was Mr. Graham, under his contract, to do in reference to those stones up here? A. He was to bring them down from the quarry.

The COURT: You mean those that were afterwards carved into capitals?

The WITNESS: Yes, sir. He was to bring them down from the quarry after they had been put on cars by the Thompson-Starrett Company, and bring them to his yard or wherever he pleased and roughed them into shape and put a bottom piece on them, a bottom to sit on. The stone was roughed, so

that it did not look any more like a capital than it did before. That work simply roughed it out so that somebody possibly might be able to guess, when he turned over the rough stone, or say that it was intended for a Corinthian capital, but he would have to be a pretty sharp architect to even come to that conclusion, because there was so little work by Mr. Graham. I do not make that remark to belittle in any way the work that Mr. Graham did. He had trouble enough with the stones himself, and so would anybody that had to handle stones of that size in Corinthian capitals in granite. Granite is the (1539) hardest stone we have to handle and carve in that way.

Q. I hand you now setting plan No. 8. Look at the marks upon it and state when it was received from Mr. Graham and what was its subsequent history in your office and in Mr. Graham's office? A. This is the original drawing by Mr. Graham, No. 8. It was received from Mr. Graham July 30, 1907 and approved by me July 31, 1907.

Q. I hand you now setting plan No. 9. State when it was received by your office from Mr. Graham, and its subsequent history? A. This drawing No. 9 was received from Mr. Graham August 5, 1907. It was checked up by the architects and returned by them August 15, 1907, and it was approved by me on the same date, August 15, 1907, by my own signature.

Q. I hand you setting plan No. 10. Look at the marks upon it and state when it was received by your office and its subsequent history until approved? A. This is drawing No. 10 of a set. It was received in my office. It does not seem to have a stamp when it was received from Mr. Graham. The first stamp on it shows that it came back from the architects August 13, 1907, which indicates that Mr. Graham sent it to me before that. It came back from the architects August 13 and was approved by me on the same date, August 13, 1907. It then was apparently called back from Mr. Graham and received on September 9, for some little revision or other. There are marks on it in red ink which indicate some changes in the dimensions of the stones. It was then received back from the architects September 12, and approved by me on the same date as revised. Then it was evidently returned to Mr. Graham.

Q. What do these red marks on the verge, the red circles around black numbers at the side of many of the stones, mean, and who placed them there? A. I do not know who placed them there, whether it was the architects or Mr. Graham by their direction. They indicate that the dimensions of the stones were changed by these little amounts here. For instance, here is a stone that was originally given a length of seven feet

three, surrounded by a red circle, and underneath is written, seven feet and a half an inch, meaning that they made it two and one-half inches shorter. Another stone is changed a quarter of an inch. That stone is about seven feet long and it is changed a quarter of an inch in length. Another one is changed about one and three-quarters inches. Those are simply changes in the dimensions in the length of the stones a few (110) of them. That was all, I believe, in one course, course Z-2.

Q. Why were these little changes there made? A. I can not tell you precisely. If I saw the other drawings I could probably compare and make out; but these courses were up near the dome, higher up the wall than what we were looking at a while ago. This course is just below the window sill, this big window here (indicating), it is over behind this, the projection behind. These stones were there.

Mr. HARLEY: Where were they?

The WITNESS: Just under the window, the sill of the window.

Mr. HARLEY: What would call that (indicating)?

The WITNESS: The pediment.

Q. Can you point out the course here (handing witness photograph)? A. Yes, the stones right along here (indicating). This is the elevation of the big window, and these courses right in here (indicating on plan). They are marked on the plan by numbers Z-1, Z-2, Z-3. These courses run right along there (indicating).

Q. I hand you setting plan No. 11. State when it was received by your office and when approved? A. This is setting plan No. 11. It represents the course of stone just above that on the last sheet we were looking at. That plan came from Mr. Graham on August 26. It was examined by the architect and returned to me the next day, August 27, and was approved by me on the same date and signed by me August 27, 1907.

Q. I hand you setting plan No. 12. When was this received by your office and when approved? A. Setting plan No. 12 was received by August 26, 1907. It was checked up by the architect and returned on the next day, August 27, and was approved by me on that same date, August 27, 1910.

Q. I hand you herewith setting plan No. 13. When was this received by your office from Mr. Graham and when was

it approved? A. It was received from Mr. Graham on September 3, 1907. It was received back from the architects the next day, September 4, and was approved by me on that (141) same day, September 4, 1907.

Q. I hand you setting plan No. 14. When was it received by your office from Mr. Graham and when was it approved? A. Drawing No. 14 was received from Mr. Graham on September 3, 1907. It was received back from the architects, checked, September 4, and it was approved by me on the same day, September 4, 1907.

Q. I now hand you drawing No. 15, setting plan. When was this received by your office from Mr. Graham and when approved? A. This is setting plan No. 15. It was received by me September 9, 1907. It was received back from the architects, checked, on September 12, 1907, and it was approved by me on the same date, September 12, 1907.

Mr. HALL: I will ask the stenographer to make a note here that all these setting plans are offered in evidence by us.

Q. I now hand you setting plan No. 16. When was it received by your office from Mr. Graham, and when was it approved? A. Drawing No. 16 was received from Mr. Graham on September 30, 1907. It was received back from the architects on October 5, and approved by me on the same date, October 5, 1907.

Q. I hand you setting plan No. 17. When was it received by your office, and when approved? A. Drawing No. 17 received by my office on September 30, 1907. It was received back from the architects on October 5, and approved by me on the same date, October 5, 1907.

Q. I hand you setting plan No. 18. When was it received by your office and when approved? A. Setting plan No. 18 was received by my office from Mr. Graham on October 1, 1907. It was received back from the architects October 5, and approved by me on the same date, October 5, 1907.

Q. I hand you setting plan No. 19. When was this received by your office, and what was its history until approved? A. Setting plan No. 19 was received from Mr. Graham on October 7, 1907. It was returned by the architects to my office on October 10, and sent to Mr. Graham for correction and returned by him on October 17. It was checked up again by the architects and returned by them on October 21, and ap- (142) proved by me on the same date, October 21, 1907.

Q. I hand you setting plan No. 20. When was this received by you and when approved? A. This is setting plan No. 20.

Q. What date appears on there? A. The date appears on here in black ink put on by the contractor, October 11, 1907.

Mr. GARVAN: What date was that when it was received?

The WITNESS: I do not know when it was received. It is not marked. There is no date on it. There is a date on here put on evidently by the contractor who made the drawing and it is October 11, 1907. There is also in ink one here, received January 24, 1908. Approved by me, January 29, 1908.

Q. Do you find any stamp on this, showing its receipt by your office? A. No.

Q. I hand you setting plan drawing No. 21. When was it received by your office and when was it approved? A. This is setting plan No. 1. It was received October 15, from Mr. Graham and received back from the architects October 19, 1907, and approved by me October 21, 1907.

Q. I hand you setting plan No. 22. When was it received by you and when was it approved? A. Plan No. 22 was received from Mr. Graham on October 15, 1907, and returned to me from the architects October 19, 1907. It was approved by me October 21, 1907.

Q. I hand you setting plan No. 23 and setting plan No. 24. When were they received by your office and when approved? A. Setting plans Nos. 23 and 24 were both received on October 22, 1907. They were returned to me by the architects October 24, 1907, and approved by me October 25, 1907, both of them.

Q. I hand you now setting plan No. 25. When was it received by you and when approved? A. Setting plan No. 25 was received November 1, 1907, from Mr. Graham. It was approved by me on November 5, 1907.

Q. I hand you setting plans Nos. 26 and 27. When were (113) they received by your office and when approved? A. Setting plans Nos. 26 and 27 were both received from the contractor Mr. Graham on December 9, 1907. They were received back from the architects corrected December 11, 1907. They were approved by me on the same date, December 11, 1907.

Q. Here is setting plan No. 28. State when this was received by your office? A. This is setting plan No. 28. This was received by my office from Mr. Graham on February 29, 1908, and returned after correction by the architects on March 9, 1908.

Q. Was it returned to Mr. Graham for correction? A. I am not sure. I think not.

Q. Look at the dates. A. It came back to me from the architects on March 9, 1908, and I marked it approved on March 10, 1908, but I do not think it ever went back to Mr. Graham, because that was just about the time that he stopped business on the contract. There was no Mr. Graham to send it to, that I could find.

Mr. HARLEY: Now, if your Honor please, we submit that that is irresponsive to the question, and we move the court that the voluntary statement be stricken out.

The COURT: What I said should be stricken out is the last part of the answer, reading:

"There was no Mr. Graham to send it to, that I could find."

Q. I hand you herewith a setting plan marked "Supplementary drawing to Setting Plan No. 2". When was this received by your office and when approved? A. This is supplementary drawing to setting plan No. 2. It was received from Mr. Graham on September 30, 1907. It came back from the architects on October 5, 1907, and was approved by me on the same date, October 5, 1907.

Q. I hand you plan marked "Quarry Diagrams for Column Caps, South Pavilion". When was that received by your office and when approved? A. This is marked "Quarry Diagrams for Columns Caps". That was received from Mr. Graham October 16, 1907, and was approved by me October 17, 1907. It is not supplementary to any particular sheet, but is (111) supplementary to the general set of drawings.

Q. Here is a plan marked "Quarry Diagrams for Pilaster Caps". When was this received from Mr. Graham and when was it approved by you? A. This was received on November 27, 1907, and approved by me on November 29, 1907.

Q. Do you know of any further setting plans prepared by Mr. Graham under this contract? A. I do not think of any, no, sir.

Q. Does that complete the setting plans? A. It does.

Mr. HILL: We now ask counsel for the letter from Mr. Green to Mr. Graham dated November 21, 1906.

(The letter referred to was produced by counsel for the defendants.)

Q. State if you wrote a letter to Mr. Graham on November 21, 1906? A. I did.

Q. I hand you this letter, and if that is the letter, read it to the jury? A. This is a letter written by me to Mr. Graham, dated November 21, 1906, and reads as follows:

BUILDING FOR THE NATIONAL MUSEUM.

(145)

Office, Superintendent of Construction,
Library of Congress,

Washington, D. C., November 21, 1906.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

Please let me know right away what progress you have made on the setting plans for the south pavilion granite work for the National Museum building, and how soon you will have any important portion of them ready to submit for approval.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

(146) Q. We ask now for a production of the letter of Mr. Green to Mr. Graham of December 1, 1906.

(The original of the letter referred to was produced by counsel for the defendant.)

Q. Did you write this letter, and if so, read it to the jury (handing witness letter). A. I wrote this letter dated December 1, 1906, to Mr. Frank F. Graham.

(The letter referred to was here read aloud by the witness to the jury.)

Said letter is as follows:

December 1, 1906.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

On examining the tracing of drawing No. 1 of your setting plans, sent with your letter of the 30th ultimo, it appears

to me that several of the corrections noted in black pencil figures by the architects, other than those "in east and west outside walls of portico," have not been made.

I agree with you that the very fine fractions of inches, requiring the use of 3rds, 6ths, 24ths, etc., are inconvenient, unnecessary and confusing to the stone cutters, and that the figuring should adhere to fractions in subdivisions by 2, of which the smallest should not be less than 32nds.

As it will be necessary to do more or less erasing and adding to the already small and indistinct figures on the tracing, I return the tracing to you herewith, advising that you re-trace it and place on it in ink the dimension figures as corrected by the architects, using the nearest 16th and 32d fraction of an inch and taking care to have the dimensions sum up to the full dimension of each full length of face. Please make the figures somewhat larger and clearer, and do not take into account any joint thicknesses. The latter should be taken care of on the cutter's diagrams. As soon as the new tracing is thus ready, send it over here for the architects to examine and to insert themselves in ink the few dimensions that may be wanting or to correct in ink any that may be wrong. In this (147) way, we will lose very much less time in getting the drawings, which we have been sadly waiting for, ready for the quarrying and cutting work.

The contract was signed October 23d, last, and we have been waiting for the completion and approval of the setting plans ever since.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Mr. HILL: I ask for the production of a letter written by Mr. Green to Mr. Graham dated January 31, 1907.

(The letter referred to was produced by counsel for the defendants.)

Q. I hand you this letter and ask you if you wrote it, and if so, please to read it? A. This is a letter addressed by me to Mr. Graham dated January 31, 1907.

(The letter here referred to was read aloud by the witness to the jury.)

Said letter is as follows:

January 31, 1907.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

In pursuance of your letter of the 24th instant, I have caused to be prepared copies of the full size working drawings of the pilaster caps and bases already cut from the Bethel granite for the south front of the Museum building to enable you to prepare correct templates to cut corresponding ones in your contract.

I expect Mr. Piric, the inspector, to be with you pretty soon. If, when he comes, it appears to be necessary to have copies of the actual templates in use at the Vermont works, which I doubt, they can be procured. The drawings, in two sheets, are forwarded to you by this mail, and in the same roll (1148) are full size details Nos. 176, 178 and 181 of profiles of the cornices, dome base stones, etc.

We have been informed that the Thompson-Starrett Co. shipped you a carload of stock on the 17th instant. The Company, however, sent no invoice because not certain in just what form it should be made out, but the inspector has given the following schedule:

Course A Nos. 4, 7, 10, 11, 12, 16, 36, 43.
" B Nos. 2, 3, 6, 8, 10, 21, 32, 35, 40, 41.
" C Nos. 2, 3, 34, 35.
" E Nos. 1, 5, 15.
" F Nos. 15.

In future, I will expect the invoices to be more systematically made out and forwarded by the Company itself, checked up and approved by the inspector at the Bethel quarry. I am using efforts to have stones follow this first carload in at least a moderate quantity during the very cold weather.

We hope you are making good progress with the setting plans, of which only 5 so far have been checked up and approved. You know, the setting plans are a very necessary preparation for the information of the quarryman in Vermont and the avoiding of delay in the quarrying and shipping of the stock to you. I understand that some of the patterns that have been quarried, and perhaps some of those in this first carload, are of rather awkward shape. Although something of this character is a peculiarity of the stock and quarry, it is hoped

that serious roughness and excessive fullness of the patterns may be avoided.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Please explain to the jury what are full sized details, mentioned in this letter? A. Full sized details for the stone-work means drawings giving the details of the peculiarities of the shape of a stone on a scale that is full size. That is, the drawing is drawn to a scale of a foot to a foot, so to speak. (119) Q. For what purpose are they used? A. They are used for the purpose of making patterns and getting off the dimensions of angles and curves and what not, that are peculiar to the finished stone.

Q. Are they necessary to the contractor before he can prepare his setting plans? A. No, indeed.

Q. Are they necessary for the quarrying of the stone? A. No, except in possibly a very few instances of very peculiar shapes; but ordinarily they are not required. I would make the same qualification in my answer as to their not being needed in the setting plans. In some few instances, a full size would be necessary—at least helpful.

Q. Please look at the last sentence in that letter and state what is meant by "peculiarities of stock and quarry." A. What was meant by that was the character of the stone at the quarry as to its seams and rifts, how it happens to lie, whether level or inclined, and whether the quarry contains cracks in itself that limit and govern more or less the facility with which the quarrymen can get out the particular stone that he is undertaking to get out of it. Every quarry has certain individual peculiarities of this kind, and this quarry had a number that were quite peculiar, adding to the difficulty of quarrying the stone, and it was necessary to have the drawings there ahead and all the knowledge necessary for getting out the stone, before they undertook to do anything in the quarry. They cannot do any work ahead in the quarry without a complete knowledge of what is to be finally gotten out of the quarry, and therefore time is needed in the start, sometimes a good deal of it. You cannot get out of a quarry inside of a good while, it may be many days, a particular kind of stone. It does not lie on the surface. It may be so full of cracks in the quarry, or rifts, that you have got to quarry out a good deal of stone and get it out of the way in order to get a full and complete piece that will furnish a special piece, a piece of a given shape.

Q. Was that a peculiarity of this quarry? A. Yes, decidedly so.

(150) Mr. Hill: I should like the letter of July 25, 1907, from Mr. Green to Mr. Graham.

(The letter referred to was produced by counsel for the defendants.)

By Mr. Hill:

Q. I hand you this letter. Please examine it and read it? A. The date of this letter is July 25, 1907, and it is addressed by myself to Mr. Frank F. Graham.

Q. Please read it to the jury.

The witness here read aloud to the jury the letter referred to, said letter being as follows:

July 25, 1907.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

You remember that when I visited your works last week, I urged that the drawing of the remainder of the setting plans for the National Museum work be pushed as rapidly as possible. If this is not done, it is most likely that you will be delayed in getting stone, especially the larger stone, from Vermont. Owing to your suspension of the work on these plans last spring while waiting for the approval of your drawing No. 7, I am afraid that serious delay in the quarrying is going to result. You ought to have gone on with the plans at that time instead of waiting for No. 7, because the greater portion of the work did not depend upon it.

Now, I have a letter from the Thompson-Starrett Co. in the same vein as the above. They say that "the fact that we have very few sizes in the quarry is reducing our output on this order very greatly. The summer is more than half gone and the quarry, for want of sizes, is running about half capacity. We believe that there is going to be severe complaint later on, on the score of our failure to deliver stone to Mr. Graham, and hope that you can do something to supply us with the sizes for the remainder of the work."

When will you have another plan ready for approval?

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

(151) The WITNESS Continuing: What is meant by want of sizes is that they had not the plans necessary to show the sizes of stones they were to quarry. That was want of sizes.

Mr. HILL: I now ask for the production of the letter of August 21, 1907, from Mr. Green to Mr. Graham.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. I hand you this letter of August 21, 1907, and ask you if you wrote that letter, and if so, to please read it to the jury. A. This is a letter addressed by me to Mr. Graham, dated August 21, 1907.

The letter referred to was here read aloud by the witness to the jury, the same being as follows:

Aug. 21, 1907.

Mr. F. F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

In furtherance of my call upon you by telephone today, I write to urge expedition in turning out the remainder of the setting plans for the granite work for the National Museum building.

These have come out so slowly, even since I called your attention to the matter in my letter of July 25th, 1907, that it may prove later that the Thompson-Starrett Company has been held back in the work for want of the sizes of stock to be obtained from the drawings.

The number of sheets at the present time has reached ten and course Z-3, one having been approved only a week ago.

Please let me know immediately when the next sheets will come and when you will complete the whole set. They ought to be done by the beginning of next month, and, if necessary, you ought to put more force on the work.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

(152) Mr. HILL: I now ask for the production of a letter from Mr. Green to Mr. Graham dated September 23, 1907.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. Please state to the jury if you wrote this letter, and if so, read it (handing letter to witness). A. This letter I wrote to Mr. Graham on September 23, 1907.

The witness here read aloud to the jury the letter referred to, the same being as follows:

Mr. Frank F. Graham, September 23, 1907.
Calhoun St. & B. & O. R. R.
Baltimore, Md.

Sir:

You are very slow getting out the setting plans for the south pavilion granite work. No. 15, carrying the work up to course Z-8, approved some two weeks ago, appears to be the last one. It is time that the whole set was completed. What is the cause of the delay?

The models for all of the carving that you have to do on the pavilion work, including the models for the roughing out of the column and pilaster caps, are ready to be shipped to you. Please let me know whether you are ready to receive them and to what address they should be sent. The models consist of:

2 rough caps (column and pilaster, respectively).
2 models for architrave, namely: (Leaf and tongue; (Leaf
4 models for cornice, namely: (Bead and reel. (Egg and dart. (Medillion. (Leaf and tongue.
4 models for ceiling panels, namely: (Egg and dart. (Leaf and tongue. (Section of fret.
2 models for small ceiling panels, namely: (Leaf and tongue. (Egg and dart.

Yours respectfully,

BERNARD R. GREEN
Superintendent of Construction.

(153) Q. After the setting plans prepared by Mr. Graham had been approved by your office, what was done with each of them? A. They were immediately sent to the quarrymen for their guidance and sent to Mr. Graham for his guidance.

Q. What became of the originals? A. Mr. Graham kept them.

Q. And what was sent to the qurry? A. Blueprints.

Q. How soon were these sent to the quarry after approval? A. Immediately; as soon as they could be made; within a day or two, usually.

Q. In each case? A. In each case. I do not remember any that were delayed. They might have been delayed a day or two by reason of cloudy weather or bad weather for blueprinting, or something like that.

Mr. HILL: I now ask for the production of a letter of March 11, 1908, from Mr. Green to Mr. Graham.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. Please look at this letter, and if you wrote it, read it to the jury (handing witness letter)? A. This letter I wrote to Mr. Graham on March 11, 1908.

The letter referred to was here read aloud by the witness to the jury, said letter being as follows:

March 11, 1908.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

I was surprised, on Sunday, the 8th instant, to hear that you had apparently stopped work indefinitely the day before on your contract of October 23, 1906, for the granite work of the south pavilion of the National Museum building. This was confirmed by a telegram from the Government Inspector on the following day and further on the next day, the 10th (154) instant, by letter from the Inspector, stating that all operations were entirely stopped at your cutting yards and

that, from information obtained from your brother on the ground, acting as a watchman, the work had actually been abandoned and that further information might be had from an attorney whose card he presented.

You must realize that it is indispensable to your own interests, as well as the Government, that I be immediately and correctly informed of the facts by yourself.

The information as to your stopping work came without the slightest warning or premonition to this office, and is especially surprising after having written you on February 29, 1908, that you should take immediate steps to increase your force and expedite the work. You have a large amount of stock on hand to work with and more on the way from the quarry.

If you do not intend to actively resume operations within reasonable time, although your contract is already seriously delayed, annulment of the contract must follow, under its terms, and the work taken in hand by the Government as therein provided.

Trusting I may have an immediate reply, I remain,

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Mr. HILL: I now ask for the production of a letter of March 11, 1908, from Mr. Green to the Title Guaranty & Surety Company, and also of the enclosure mentioned.

(The letter and enclosure referred to were produced by counsel for the defendants.)

By Mr. HILL:

Q. If you wrote that letter, please read it to the jury and state what the enclosure was. A. I wrote this letter to the Title Guaranty & Surety Company at their office in the Colorado Building, Washington, D. C.

The letter referred to was here read aloud by the witness to the jury, said letter being as follows:

(155) Mar. 11, 1908.

The Title Guaranty and Surety Co. of Scranton, Pa.,
Colorado Building,
Washington, D. C.

Gentlemen:

I enclose, for your information, a copy of a letter of this date to Mr. Frank E. Graham, of Baltimore, Maryland, relating to his contract of October 23, 1906, in amount of $149,000 for cut granite for the south pavilion of the new building for the National Museum, in this City, on which you are a surety.

Should the annulment of the contract be made, I presume it would be most to the interests of all concerned if the work could be resumed with proper promptness at Mr. Graham's yards in Baltimore, either by the Government directly or by yourselves if we can agree that that would be better.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

By Mr. HILL:

Q. What was the enclosure referred to in that letter? A. It was the letter I last read.

Q. The letter you last read? A. The letter that I last read, addressed to Mr. Graham. I made a copy of that letter and enclosed it *will* this letter to the Title Guaranty & Surety Company.

Q. In your letter to Mr. Graham of March 11, 1908, you referred to a letter you wrote him on February 29, 1908. A. Yes, sir.

Mr. HILL: I will ask for the production of that letter by counsel for the defendants.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. Please look at this letter, and if you wrote it, read it to the jury (handing witness letter). A. I wrote this letter to Mr. Graham, February 29, 1908. It reads as follows:

(156)

February 29, 1908.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

It appears that since my letter of the 7th instant, you have failed to increase your facilities for the output of granite cutting for the National Museum building under your contract.

Little more than one-third of the cubic-foot quantity of the stone has as yet been cut. Reckoning by the actual work in the job, it can hardly be called much more than one-quarter, and, if you go on as you are doing, the job will continue until next fall before completion. I must insist on your adding to your yard facilities and cutting force immediately, so as to very much increase the output.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. I hand you herewith a letter addressed to you, in an envelope addressed to you, the letter being dated March 14, 1908, and signed "Harry E. Scherf," and I will ask you if you received this letter, and if so to read it to the jury. A. I received this letter of March 14, 1908, from Mr. Harry E. Scherf. It reads as follows:

"HARRY E. SCHERF,
Attorney at Law,
Baltimore, Md.
427-428 Law Building,

March 14, 1908.

Mr. Bernard R. Green, Supt. of Construction,
Library of Congress, Washington, D. C.

My dear Sir:

Yours of the 11th instant addressed to Frank F. Graham has been handed to me as his attorney for reply. I beg to state that my client has stopped work on the granite work of

the south pavilion of the National Museum Building. This act on the part of my client was necessary for his financial welfare in view of the fact of the damage he has sustained, which said damage was not occasioned by any fault or neglect on his part, by reason of the manner in which this matter has (157) been gone on with on the part of the government, and their agents in the matter. If this matter can be in anyway amicably adjusted, he should be glad to do anything that may be fair and equitable between the parties.

Very truly yours,

HES/JFF. HARRY E. SCHERF.

Mr. HILL: I will now ask for the production of a letter written in answer to Mr. Scherf by Mr. Green, dated March 16, 1908.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. I will ask you to look at this letter dated March 16, 1908, to Harry E. Scherf, attorney at law, and ask you if you wrote it, to read it to the jury? A. I wrote this letter of March 16, 1908, to Mr. Harry E. Scherf, attorney at law, Baltimore, Maryland.

The letter referred to was here read aloud by the witness to the jury, said letter being as follows:

Mar. 16, 1908.

Mr. Harry E. Scherf,
Attorney at Law,
#427 Law Building,
Baltimore, Md.

Sir:

I am in receipt of your note of the 14th instant in answer to my letter of the 11th to Frank F. Graham, contractor for cut granite work for the National Museum building, in which you inform me that he has stopped work on said contract.

I am not aware of any matters requiring adjustment other than the absolute necessity, in the interest of both the Government and Mr. Graham, that work be resumed on the performance of the contract with the least possible delay.

If Mr. Graham gives me no immediate assurance that he is to thus resume the work, I must proceed with the annulment of the contract and the performance of the work at the expense of the contractor, as required and provided for by its terms.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

(158) Q. Mr. Green, had you any other information of the abandonment of this contract by Mr. Graham except that received in the letter you have read? A. I had, through the inspector, Mr. Pirie.

Q. Who is Mr. Pirie? A. Mr. Pirie was the inspector employed at Mr. Graham's works, on the part of the government, to see that the contract was properly carried out.

Q. After writing to Mr. Scherf the letter of March 19, 1908, which you have just read to the jury, what did you next do in reference to this matter, if you recollect? A. I do not remember the exact next step.

Mr. HILL: I now ask for the production of a letter from Mr. Green to Mr. Graham of March 18, 1908.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. I would ask you if you wrote this letter, and if so, please to read it to the jury? A. I wrote this letter of March 18, 1908, to Mr. Graham.

(The letter referred to was here read aloud by the witness to the jury.)

NOTE: The letter here referred to has been hereinbefore inserted.

Mr. HILL: I now ask for the production of a letter of Mr. Green to the Title Guaranty & Surety Company dated March 18, 1908.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. I hand you this letter and ask you if you wrote that letter to please read it to the jury, and state what letter the enclosure was? A. I wrote this letter on March 18, 1907, to Title Guaranty & Surety Company, the surety on the contract of Mr. Graham.

(The letter referred to was here read aloud by the witness to the jury.)

Said letter is as follows:

March 18, 1908.

The Title Guaranty & Surety Company,
Colorado Building,
Washington, D. C.

Gentlemen:

(159) I enclose herewith, for your information, copy of my letter of this date to Frank F. Graham, of Baltimore, Maryland, notifying him of the annulment of his contract of October 23, 1906, on which you are surety, for furnishing cut granite for the south pavilion of the National Museum building.

I also enclose the financial statement of the contract at this date, which is exact within about $25—not yet adjusted for entry.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

The WITNESS: The letter that I enclosed a copy of was that one I last read, written by myself to Mr. Graham on the same date.

Q. As a part of that letter will you please read the financial statement which was put in it? A. This was the financial statement referred to:

BUILDING FOR THE NATIONAL MUSEUM.

Office of
Bernard R. Green, Superintendent of Construction,
Library of Congress, Washington, D. C.

March 18, 1908.

Financial statement of contract for Cut Granite required for the south pavilion above first floor level:

1906				
Octo.	23,	To value of contract.		$149,000.00
		To value of supplemental contract not yet executed.		4,000.00
1907				
June	27,	By cash,	$3,491.14	
July	24,	" "	3,813.80	
Aug.	16,	" "	3,089.23	
Sept.	4,	" "	2,618.04	
	27,	" "	2,821.50	
Oct.	10,	" "	3,509.00	
	25,	" "	2,655.54	
	31,	" "	1,766.25	
Nov.	16,	" "	6,475.50	
(160)				
Dec.	6,	By cash,	6,660.00	
	20,	" "	4,500.00	
1908				
Jan.	4,	" "	3,600.00	
	24,	" "	5,400.00	
Feb.	13,	" "	4,500.00	
	14,	" "	1,800.00	
Mch.	6,	" "	2,700.00	
			$59,400.00	$153,000.00

The COURT: Those were payments, which you have just read?

The WITNESS: Yes, sir.

Mr. HARLEY: That is the amount what was stated in our opening statement to have been paid.

By Mr. HILL:

Q. Mr. Green, before writing these two last letters, did you consult with the authorities of the Smithsonian Institution?

Mr. GAITHER: We object to that; we do not know who the authorities are.

To the propounding of which question, the defendant and each of them then and there objected; but the court overruled said objection and permitted the witness to answer the said question.

The COURT: You may answer the question.

Mr. HARLEY: We note an exception on behalf of both defendants.

The COURT: The question is, did he consult the authorities. It is not stated who they are, but the question is, did he consult.

Mr. HILL: Yes, sir.

(The question was repeated by the stenographer.)

A. I do not remember specifically. I am quite sure I did, because I was in consultation and discussion with the Secretary, who represented the authorities, about the whole matter while it was in progress.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their sixth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Seventh Bill of Exceptions.

(161) After the matters set forth in the defendants' aforegoing bills of exceptions all of which are hereby incorporated in and made a part of this, their seventh bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

By Mr. HILL:

Q. Mr. Green, before writing these two last read letters, did you consult with the authorities of the Smithsonian Institution? A. I do not remember specifically. I am quite sure I did, because I was in consultation and discussion with the Secretary who represented the authorities, about the whole matter while it was in progress.

Counsel for the defendants then and there moved the court to strike out as being irresponsive to the question all that portion of said answer immediately after the word "Secretary" and reading as follows: "who represented the authorities about the whole matter while it was in progress;" and the court then and there refused to grant said motion and refused to strike out said words "who represented the authorities about the whole matter while it was in progress."

To which action of the court in so refusing to grant the defendants' said motion to strike out said language and in permitting the said language to stand, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their seventh bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Eighth Bill of Exceptions.

(162) After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their eighth bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

Mr. HILL: I now ask for the production of the letter of April 2, 1908, from Mr. Green to Mr. Graham.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. I hand you this letter, and if you wrote it, please read it to the jury? A. I wrote this letter to Mr. Graham on April 2, 1908. It reads as follows:

Mr. Frank F. Graham, April 2, 1908.
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

In response to my letter of March 18, notifying you of the annulment of your contract of October 23, 1906, for the cut granite required for the south pavilion of the National Museum Building, I received a letter, dated March 19th, from Harry

E. Scherf, an attorney at law, stating that you had handed him the letter for that purpose and that you were willing to have the Government use your plant for continuing and completing the contract on certain conditions. In reply, I wrote to Mr. Scherf on the 20th of March, stating that the taking of the plant for the purpose stated could not be conditioned upon adjusting alleged damages, but that such adjustments must be made independently of the continuation of the work. To this I have had no reply.

I understand that the surety company is making no arrangement for continuing the work on the contract or towards the end of securing the use on the part of the Government of your stone cutting plant in Baltimore. I had presumed that you would readily arrange for such use of the plant as a measure of economy to yourself.

(163) Before making other arrangements for continuing the work I have to request that you will answer as to whether you will give the Government immediate possession of your plant for the purpose of carrying on the work according to the terms of the contract.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Mr. HILL: I now ask for the production of a letter dated April 1, 1908, from Mr. Green to the Title Guaranty & Surety Company.

(The letter referred to was produced by counsel for the defendants.)

By Mr. HILL:

Q. I hand you this letter and ask you, if you wrote it, to please read it to the jury. A. I wrote this letter to the Title Guaranty & Surety Company of Scranton, Pennsylvania, dated April 1, 1908, which reads as follows:

April 1, 1908.

The Title Guaranty & Surety Co. of Scranton, Pa.,
Colorado Building, Washingtong, D. C.

Gentlemen:

You have been apprised, by means of copies of correspondence passing between Frank F. Graham, of Baltimore, Maryland, and this office during the past two weeks, of the abandon-

ment on his part and the consequent annulment of his contract of October 23, 1906, on which you are surety, for furnishing cut granite for the south pavilion of the National Museum building .

In the meantime, you are understood to have been endeavoring to arrange with Mr. Graham that the Government might, as a measure of economy in the interest of all parties concerned, use his granite cutting yard and equipment in Baltimore for carrying out the said contract.

On hearing nothing from your office on the subject for a week past, I called and inquired at your office today and was there informed by Mr. Philip Walker, your attorney, that, having failed in your efforts with Mr. Graham for the object stated, you had abandoned the efforts some two or three days ago. (164) Under the circumstances, I must now proceed to make the necessary arrangements for continuing the work independently, as required by the terms of the contract.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. I hand you letter dated April 3rd, 1908, on the letter head of the Title Guaranty & Surety Co., purporting to be signed by George T. Parker, resident vice-president; if you received such letter, read it in full to the jury. It is from the Philadelphia office. A. I received this letter from Fred. T. Parker

Mr. HARLEY: George T. Parker.

The WITNESS: I received this letter from George T. Parker, resident vice-president, on a letter head of the Title Guaranty & Surety Co., from Philadelphia.

April 3, 1908.

Bernard H. Green, Esq.,
Superintendent of Construction,
Library of Congress, Washington, D. C.

My dear Mr. Green:

Your letter of the 1st inst. addressed to me at Washington has been referred to me here by Mr. Walker, and in reply I hasten to inform you that I have instructed our Mr. Chas. F.

Hurley, of Baltimore, Md., to take this matter up at once with Mr. Graham and his attorney with a view of forcing them, if possible, to deliver to you the yard and material on hand in Baltimore.

I have instructed him to advise me promptly of the result of his efforts and I will telephone or wire you as soon as I receive his reply.

Trusting that we may be able to have Mr. Graham see this matter in the proper light and surrender the yard and material I am,

Yours very truly,

GEO. T. PARKER,
Resident Vice-President.

(165) Mr. Hull: I now ask for letter dated April 10th, 1908, addressed to the Title Guaranty & Surety Co., of Scranton, Pa., Colorado Building, Washington, D. C., signed by Mr. Green.

Q. Look at this letter, and if it was written by you, please read it to the jury? A. This letter was written by me to the Title Guaranty & Surety Co., of Scranton, Pa., office in the Colorado Building, Washington, D. C., on April 10th, 1908.

Gentlemen:

Since the receipt of your letter of April 3, 1908, in answer to my letter of April 1, 1908, notifying you, for the reasons stated, that I must make necessary arrangements for continuing independently the work on the annuled contract of Frank F. Graham, dated October 23, 1906, on which you are surety, for furnishing cut granite for the new building, for the National Museum, I have received no further communication.

This is to notify you that *arrangement* are now under way for continuing the work by the Government at the expense of the contract, and that it would be greatly to the advantage of Mr. Graham, as well as to you as his surety on the contract, if the large amount of granite stock, rough and partially dressed, belonging to the Government and now remaining at Mr. Graham's yard, in Baltimore, could be immediately removed therefrom for use at the yards where the work is to be done. Otherwise, it will be necessary to duplicate the stock from the quarry, as well as to do over again the cutting of the partially dressed stones at Mr. Graham's yard, at a considerable expense, which must be charged against the contract.

Mr. Graham himself has never made any response whatever to any communication addressed to him by this office

since his abandonment of the contract, other than through one Harry E. Scherf, whose letter head indicates that he is an attorney at law, of 407 and 408 Law Building, Baltimore, Maryland, and his communications show no disposition to aid in any way in the most economical continuance of the contract work by the Government, although the whole cost thereof must be charged against the account of the contract on which you are surety.

(166) It would seem to be seriously to your interest to do what you can towards minimizing the cost of the work, especially in the item of securing the release to the United States of the granite belonging to it and resting in Mr. Graham's stone yard for the purpose of the contract at the time he abandoned it, and understood to be still there.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Here is a letter dated April 11, 1908, from Philip Walker, to you; if you received this letter, please read it to the jury, reading also every printed word on the heading of the letter, both in black and red ink? A. I received this letter dated April 11th, 1908, from Mr. Philip Walker.

Mr. HARLEY: We shall object to anything except the body of the letter.

Mr. HILL: Do you object to something in your own letter? Mr. Green, read the whole thing.

Mr. HARLEY: We make no objection to the reading of the letter, but we do object to the reading of what our brother Hill says is the red and black ink.

The COURT: He has the right to read the whole communication.

To the action of the court in permitting the witness, Bernard R. Green, to read to the jury the said printed letter head of the said letter, the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to read said letter head to the jury.

(Exception noted on behalf of both defendants.)

The COURT (Q.) Has the paper been altered since you received it, Mr. Green?

The WITNESS: No, sir, not to my knowledge.

Mr. MCLANAHAN: Excepting the back of it.

Mr. HILL: We are not offering the back of it.

The WITNESS: Nothing has been changed on its face. The sheet contains this matter "Fidelity Judicial. We issue surety bonds. Contract official. The Title Guaranty & Surety Company. Home office: Scranton, Pa. Capital and surplus over $1,000,000.00. Philip Walker, attorney. George T. Parker Company, General Agent, 201-227 Colorado Building. (167) 'Phone Main 3491. Worthington, Heald and Frailey, Local Counsel. Washington, D. C."

To which action of the court in overruling the defendants' objection to the reading to the jury of said letter head and in permitting the witness to read the same to the jury, the defendants and each of them then and there excepted, and prayed the court to sign and seal this, their eighth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Ninth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this their ninth bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

The witness, BERNARD R. GREEN, then read the body of said letter of April 11, 1908.

Mr. Bernard R. Green,
Supt. of Construction,
Library of Congress,
City.

Dear Sir:

Your letter of April 10th asking us to take steps to secure the delivery to the Government of the stone in Mr. Graham's

yard in Baltimore has been received, and we have sent it to our attorney in Baltimore with the request that he take the matter up with Mr. Graham's attorney. It will be necessary to use Mr. Graham's machinery to load the stone on the cars (168) and it will also be necessary to have a number of cars placed on the siding for this purpose.

Will you kindly suggest how you would propose to handle this phase of the situation, and also inform us what arrangements you will make for paying Mr. Graham for the work already done on the granite in his yard.

Yours very truly,

PW-P. PHILIP WALKER.

Mr. HITT: I now ask for letter dated April 13th, 1908, from Mr. Green to the Title Guaranty & Surety Co.

Q. Look at this letter, and if written by you, please read it to the jury. A. I wrote this letter on April 12th, 1908, to the Title Guaranty & Surety Co., of Scranton, Pa., Colorado Building, Washington, D. C.

Gentlemen:

Your letter of the 11th instant (by Mr. Philip Walker), in answer to mine of the 10th concerning the recovering by the Government of the granite in Mr. Graham's Baltimore stone yard used in connection with his annulled contract for the new National Museum building, is received.

The principal point is the relinquishment of the stone from his yard so that it may be transported to the New National Museum building at the earliest possible day. The matter of its loading, transportation, etc., is subsidiary. So far as the Government may have to act in the matter, it must pay the expenses, and it is presumed that you and Mr. Graham will expect this to be done. All such expenses must of course be charged against the contract. The stone being in Mr. Graham's yard and possession, as I understand it, it is first necessary to get his consent to its removal by somebody.

You will find a clear answer to your inquiry as to "what arrangements you (I) will make for paying Mr. Graham for the work already done on the granite in his yard," by referring to paragraph 4 of his contract, which states, in connection with the annulment, that "upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or

to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the (169) the first part until the final completion and acceptance of the work herein stipulated to be done; * * * Of course, if you had carefully read the contract, you could not have made such an inquiry.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Here is a letter dated April 15th, 1908, signed Philip Walker, addressed to you. If you received this letter, read the whole of it, including the printed heading at the top of the letter, both in black and red ink, as you did the prior letter. A. I received this letter—

Mr. HARLEY: We will object to that.

To the action of the court in permitting the witness, Bernard R. Green, to read to the jury the said printed letter head of said letter, the defendants and each of them and there objected; but the court overruled said objection and permitted the witness to read said letter head to the jury.

The COURT: Objection overruled.

(Exception noted on behalf of both defendants.)

The WITNESS: As I said, I received this letter from Philip Walker, dated April 15, 1908. The sheet contains this: "Fidelity Judicial. We issue Surety Bonds. Contract official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and Surplus over $1,000,000.00. Philip Walker, Attorney. George T. Parker Company, Gen. Agt. 201-227 Colorado Building. 'Phone Main 3491. Worthington, Heald & Frailey, Local Counsel."

To which action of the court in overruling the defendants' objection to the reading to the jury of said letter head and in permitting the witness to read the same to the jury, the defendants and each of them then and there excepted, and prayed the court to sign and seal this, their ninth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Tenth Bill of Exceptions.

(170) After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this their tenth bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

By Mr. HILL:

Q. Here is a letter dated April 15th, 1908, signed Philip Walker, addressed to you; if you received this letter, read the whole of it, including the printed heading at the top of the letter, both in black and red ink, as you did the prior letter. A. I received this letter—

Mr. HARLEY: We will object to that.

To the action of the court in permitting the witness Bernard R. Green to read to the jury the said letter, the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to read said letter to the jury.

The COURT: Objection overruled.

(Exception noted on behalf of both defendants.)

After reading the letter head as aforesaid, the witness then read said letter as follows:

Washington, D. C., April 15, 1908.

Bernard R. Green, Esq.,
Superintendent of Construction,
Library of Congress, City.

Dear sir:

I have a letter from our attorney in Baltimore today, from which I quote the following for your information:

"In response to your favor of the 11th instant enclosing letter from Superintendent of Construction Bernard R. Green under date of April the tenth and copy of your response there-

to of April 11th, I beg leave to advise you that I have had a (171) conference with Mr. Scherf this morning.

"I fail to see why Mr. Green should have to ask anybody for his property. The stone belongs to the Government; and Mr. Scherf has advised me that Mr. Graham will not contest the right of the Government to take its own property.

"However as to the use of Mr. Graham's machinery, I have not been able to make any arrangements with Mr. Scherf. I had hoped to make an engagement by which you could see Graham himself today. Indeed, Mr. Scherf promised to arrange this, but later notified me that it would not do any good.

"The question now seems to be what arrangements can you make with Graham for the use of his machinery for the purpose of moving the stone.

"If no arrangement can be made, Superintendent Green will simply have to move this Government property without the aid of Graham's appliances.

Yours very truly,

PW-P— PHILIP WALKER.

To which action of the court in overruling the defendants' objection to the reading to the jury of said letter and in permitting the witness to read the same to the jury, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their tenth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Eleventh Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this their eleventh bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, (172) offered and produced evidence as follows:

Q. Mr. Green, I here show you a letter of November 23rd 1906, addressed to you and signed George T. Parker, General Agent, and referring to an inclosure. Please look at this letter and if you received it, read to the jury, reading at the same time the heading as before.

(Objected to) (Objection overruled.)

To the action of the court in permitting the witness Bernard R. Green to read to the jury the said printed letter head the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to read said letter head to the jury.

(Exception noted.)

A. I received from Mr. George T. Parker, General Agent, this letter dated 23rd of November, 1906. The sheet contains this: "Fidelity Judicial. We issue surety bonds. Contract Official. The Title Guaranty & Surety Company. Home Office Scranton, Penna. Capital and Surplus over $1,000,000.00. Worthington, Heald & Frailey, Local Counsel. George T. Parker, General Agent, 201-227 Colorado Building. 'Phone: Main 3,491. Philip Walker, Attorney.

Washington, D. C., 23 November, 1906.

Bernard R. Green, Esq.,
Superintendent, Library of Congress,
Washington, D. C.

Dear sir:

Herewith I have the honor to hand you for file certified copy of Power of Attorney authorizing Geo. T. Parker, Philip Walker, Willis W. Parker and William R. Parker, or any two of them to execute bonds for this Company.

Kindly acknowledge receipt of the same, and oblige.

Yours respectfully,

GEO. T. PARKER,
Genera Agent."

Inclosure J. M.

To which action of the court in overruling the defendants' objection to the reading to the jury of said letter head and in permitting the witness to read the same to the jury, the defendants and each of them then and there excepted, and prayed the court to sign and seal this, their eleventh bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Twelfth Bill of Exceptions.

(173) After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this their twelfth bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

Q. (To the same witness) Is that the enclosure (indicating)? A. Yes, sir.

Mr. Harley: Read the enclosure.

The Court: Do you dispute the execution of the bond?

Mr. Harley: No, sir.

Mr. Gaither: This is a paper, if your Honor please, that shows the Government only knew Philip Walker as having authority to sign bonds. The plaintiff is offering that in evidence now. This is simply an authority to them, made six months before this bond was made, authorizing them to sign bonds.

The Court: He did sign the bond, did he not?

Mr. Harley: Yes, your Honor.

Mr. Gaither: I do not know whether he did or not.

Mr. Hill: We simply offer that in evidence to show that Mr. Walker was an agent of the Company. They seem not to want their letter heads to come in.

The Court: It is in evidence.

Mr. Gaither: We do not care to have it read. As the plaintiff has proven the powers of Mr. Walker, so far as they are concerned, to execute bonds, we ask to strike out both of those letters of Philip Walker offered in evidence, which refer to matters entirely distinct from the execution of the bond.

The Court: Motion overruled.

(Paper referred to was then marked plaintiff's exhibit B. R. G. No. 1.)

(It is hereby agreed that the original plaintiff's exhibit B. R. G. No. 1 here referred to may be used in any court at the hearing or argument of this case.)

Q. (Mr. HILL) I now ask you for the letter dated April 25th, 1908, addressed to Mr. Garnett Y. Clark, attorney at law, and signed by Bernard R. Green. Have you that let-
(174) ter?

Mr. HARLEY: I presume it is in your files.

Q. (Mr. HILL) If you wrote that letter to Mr. Clark, please read it to the jury. A. I wrote this letter in April 25th, 1908, to Mr. Garnett Y. Clark, Attorney at Law, 1,009 Calvert Building, Baltimore, Md.

Dear Mr. Clark.

Remembering your call on me with Mr. Walker of the Surety Company, in the matter of the Graham stone contract for the new building for the National Museum, and hearing from my agent in Baltimore that you are thought to be looking after Mr. Graham's interests, I want to remind you of the letter I wrote Mr. Graham some days ago asking if he would not turn over to the Government the various stone patterns and lay outs, cutters' diagrams, etc., made by Mr. Graham in his office for the necessary use in cutting the present and future stones for the completion of his contract.

These things can now be of no use whatever to Mr. Graham, and, if turned over to the Government, they would save a duplication that I must otherwise make at an expense to the contract of several hundred dollars. Mr. Graham or his attorney has not answered my letters and I must either have these diagrams, etc., at once or proceed with their duplication.

Yours very truly,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Please look at this letter and if you received it, read it to the jury, giving the date. A. I received this letter, dated April 27th, 1908.

"Dear Mr. Green:

Your letter *in re* F. F. Graham received. I endeavored to see U. S. District Attorney Rose today, but he was out of

town. I will try to see him as soon as he returns and communicate with you.

Yours respectfully,

GARNETT Y. CLARK.

(175) Q. Look at this letter and if you received it, please read to the jury? A. I received this letter from Mr. Garnett Y. Clark, dated May 4th, 1908.

May 4, 1908.

Mr. Bernard R. Green,
Superintendent of Construction,
Congressional Library Bldg.,
Washington D. C.

Dear Mr. Green:

After a further talk with Mr. Rose he advised me to take up with you the matter of turning over the plans, patterns and diagrams that Mr. Graham prepared for the stone work of the National Museum Building. We have all these things in good shape and *that* that as long as the Government has got to have a new set of plans, we should have, at least, a small compensation for allowing the Government to use them. As you say, it will cost the Government several hundred dollars to make the duplicate, in fact, I believe, it will cost, at least five hundred dollars to make a duplicate of these plans, patterns and diagrams. I would suggest that if you would offer a small amount for those plans, that we can obtain them for you without any difficulty. We will turn them over to you at once and save expense to the Government at the present time.

Hoping to hear from you in regard to this, I am,

Yours respectfully,

GYC MCL.

GARNETT Y. CLARK.

Mr. HULL: I now ask for the production of letter of May 5th, 1908, from Mr. Green to Garnett Y. Cark, Esq., Attorney.

Q. Look at this letter and if written by you, please read to the jury. A. I wrote this letter on May 5th, 1908, to Garnett Y. Clark, Esq., Attorney at Law, 1009 Calvert Building, Baltimore, Md.

Dear sir:

I am somewhat surprised at the view of Mr. Graham's relation to his annulled contract on the National Museum building indicated by your letter of the 4th instant, just received.

Whatever expense he compels the Government to incur in (176) the carrying out of the contract to his own account in the end, if necessary and collected from or his surety.

It would seem manifestly absurd to pay him anything for the diagrams, etc., which, in the meantime, or ever, can be of no value to him whatever.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Please look at this letter and if received by you, read to the jury. A. I received this letter from Mr. Garnett Y. Clark, dated May 6th, 1908.

Mr. Bernard R. Green,
Superintendent of Construction,
Congressional Library Bldg.,
Washington D. C.

Dear sir:

Your letter of May 5th in reference to the plans, diagrams &c. that Mr. Graham has prepared in this matter received. I regret that the Government does not feel that it can allow him anything for the use of those plans, &c., nevertheless I will arrange to have them turned over to you at once. Kindly instruct me to whom to give them, and I will see that they are in your possession at an early date. I think in order to keep Mr. Graham's legal status right in this matter, you should make a formal demand on him for them, and as soon as this formal demand is made, I will turn them over to whomsoever you wish. You may address the formal demand to him care of me, at my office, 1009 Calvert Building.

Yours respectfully,

GARNETT Y. CLARK.

Mr. HILL: I now ask for letter of May 7th, 1908, to Mr. Garnett Y. Clark from Mr. Bernard R. Green.

Q. If you wrote this letter to Mr. Clark, please read it to the jury, giving the date. A. I wrote this letter to Mr. Garnett Y. Clark on May 7th, 1908.

Dear sir:

I am in receipt of your letter of the 6th instant, regarding the patterns, full size drawings, cutters' diagrams, etc.,
(177) used by Mr. Graham in the stone cutting work under his contract for the National Museum building.

I do not see how I can make a more "formal demand" than to request Mr. Graham to furnish them to the Government for continuing the work under his contract as a measure of economy in the prosecution of it on his account and in his interest. These things are his property and subject to his own free disposition.

Kindly let me know if you can have them delivered to an agent of this office, whom I would send over immediately to Baltimore to receive them.

Yours very respectfully,

BERNARD R. GREEN,

Q. I hand you herewith letter dated May 15th, 1908, signed Garnett Y. Clark, of counsel for Mr. Graham, addressed to you, and also a special delivery envelope addressed to you; if this letter was received by you, please read to the jury. A. This letter was received by me, dated May 15th, 1908.

Mr. Bernard R. Green,
Library of Congress,
Washington D. C.

Dear sir:

In reply to your request that we turn over the plans, specifications, &c., in reference to the National Museum Building, beg to state that, after a conference with Mr. Gaither, Mr. Graham's senior counsel, and Mr. Graham, we have decided that we will refuse to give up anything which belongs to Mr. F. F. Graham.

Yours very truly,

GARNETT Y. CLARK.
Of counsel for Mr. Graham.

Q. After the receipt of that letter, what steps, if any, did you take on behalf of the Government in reference to this contract? A. I proceeded to cast about for means, and make up my mind how to proceed to carry out the contract independently—carry out the contract myself, as representing the Government in the matter. I proceeded to plan a method of (178) carrying out the contract—there were various ways to do it—and to see what other economical, expeditious steps, in the interest of Mr. Graham particularly, as well as the Government, I could make to continue the contract and complete it.

Q. Please state to the jury what was done after that? State it in a general way? A. I had examination made of the similar sort of stone cutting yards here in Baltimore, and in Washington, to see whether one could be found to take up the work and carry it on economically and properly, and made examination elsewhere; and made examination and calculations as to how I could carry it on, if I had to, without employing any other manufacturer's yard or plant. That went on for a little while until I made up my mind, after a consultation, and getting good advice on the matter, to bring the stone to Washington at the Library Building itself, which was by far the most economical method, and do the dressing of the stone there by hiring men and putting up the necessary apparatus and going on with it in the natural way of handling such work.

Q. Was there any stone in Mr. Graham's yard at the time he ceased to work on the contract? A. Yes, there was a large amount.

Q. What became of that stone? A. I finally succeeded in having it replevined through the attorney general's office of the United States, and brought it over to Washington, placing it around in the yard of the new building, the National Museum, where it was to be used for the purpose of dressing it there—finishing it for use in the structure.

Q. Was any demand ever made upon Mr. Graham to deliver up that stone? A. I do not remember whether we ever made a definite demand upon Mr. Graham. He had referred matters to his attorney.

Q. Was there any demand made on anybody before the replevined suit was brought by the Government to deliver that stone over A. I do not know precisely what we did about that. I thought the correspondence that has already been read showed what had been done.

Q. You have testified that you undertook and completed (179) the contract. At the completion of the contract, what amount is due to the Government from Mr. Graham, or from his bond?

Mr. Harley: Objected to both as to form and substance.

Mr. Hill: I would like to have the question read.

(Question read by the stenographer.)

Mr. Hill: —From his bond, if any?

Mr. Harley: This witness must testify as to his personal knowledge, as to what he saw done and as to what was paid out within his peronal knowledge. He cannot give us his opinion. He must testify to the fact and not give his opinion.

Mr. Hill: We have no intention of having him testify to his opinion. We have here a statement of the claim of the Government against the defendants and we annexed to that a list of all the Treasury vouchers showing those expenditures out of which this claim arises. We have those vouchers here in court and we will offer them in evidence. We now offer that statement in evidence.

The Court: You must examine Mr. Green as to how that statement was made up.

Q. Have you any knowledge of the statement in your hand? A. I have.

Q. What knowledge have you of that? A. That it was made up in my office where all the accounts are kept and where the whole business was managed.

Mr. Hill: Under whose supervision was it made up?

A. My own.

Q. Who had the direct physical charge of making it up? A. Mr. John Sheehy, my chief clerk.

Q. Please read that account to the jury.

Mr. Harley: We object to that.

Mr. Hill: On what grounds?

Mr. Harley: Because it is irrelevant and inadmissible.

Mr. Hill: The witness has testified that it has been (180) made up under his direction.

Mr. Gaither: He said that his clerk made it up.

Mr. Hill: His name is signed to everyone of those vouchers.

The Court: I do not think he can testify in reference to that statement in that way.

Mr. McLanahan: If your Honor please, we can take every one of these things out and hand him each particular voucher and ask him in reference to each particular voucher. We have prepared a paper which contains the number of those vouchers and it will facilitate matters very much if we could examine him from the statement. He will testify that that is a correct statement—at least that is what we think he will say, that it is a correct statement taken from the vouchers. The paper was prepared under his supervision. We submit it is proper for us to go on and prove the fact of the accounts in completing this work—what the various money was spent for, etc.

Mr. Gaither: May it please your Honor, is it possible any one can bring in their own vouchers here and make them evidence against us. They must prove that by the persons who saw the work done, and the amount paid then becomes relevant. The idea that you can bring in a lot of vouchers signed by one gentleman you bring here, make a declaration in your own favor, charging us with the money, is irrelevant—absurd. They must prove by the men who know of the employment on this work, and money expended, but to attempt to do it first of all by having this witness to swear to an account which has been made up by a lot of vouchers of the plaintiffs. If they connect it up properly, we have no objection.

The Court: How were the sums paid out which you claim were paid on account of the work required to complete the contract?

The Witness: They were paid out by my chief clerk on pay-rolls, and vouchers and checks were signed by myself, and vouchers were certified by myself through the usual process of doing business in my office. I was the disbursing officer myself. I managed the whole business by my foreman, and my people, to see the work done and see who was employed. I managed the whole matter.

The Court: I think you can ask him what amount he knows has been paid out that he himself has signed the checks
(181) for on account of this work, and then you have to

prove further that it was on account of this work. In the initial proof, you can ask him to state, if he knows, what amounts have been paid out on account of this work. He signed the checks and certified to the vouchers and made the disbursements.

Mr. GAITHER: We understand that must be followed up by some other proof.

Mr. MCLANAHAN: If your Honor please, if my brothers would like to make the formal objection, they can let this evidence in subject to exception, to be followed up by the proof of the chief clerk and by every time-keeper, etc., who was on the job. We are asking Mr. Green now because we did not want to recall him later. We thought it would be well to get from him what he knows personally about this matter.

The COURT: I agree with you in that, and have so ruled.

Mr. HARLEY: We would like to reserve the point. Is there any question before the court?

The COURT: I understood that Mr. Green really disbursed the money. Now, I will allow him to testify as to what amounts he disbursed on account of this contract. That isn't proof that it was properly chargeable on account of this contract, but it makes the first step that it was paid out by the Government. As it is now close to the hour of adjournment, we will adjourn to meet tomorrow morning at ten o'clock.

Mr. HILL: We will now, may it please your Honor, proceed, as the first step in proving the payments to Mr. Graham, to offer the vouchers on which payments were made. We will offer all vouchers on which payments were made in this case and we will prove each voucher and prove exactly what it is for, the signature of Mr. Green in each case and the signature of the person to whom payment was made certifying that the proper amount was paid and that the account was correct, and we will later on produce all the checks showing the payments, the checks having on the backs of them the signature of the persons who received the money. I first file herewith voucher No. 941 to Frank F. Graham for $3,191.14.

Mr. HARLEY: This is, of course the first payment to us.

(182) Mr. MCLANAHAN: These vouchers show the payments to all payments to you and everybody else.

By Mr. Hill:

Q. (To Bernard R. Green, the same witness) Please look at this voucher and state whose signatures appear upon it, this being voucher No. 941, for $3,491.14, and read it and explain to the jury what it means. A. This is one of the regular forms of Government voucher which was used in making payments to Mr. Graham on his contract. His first payment was made on voucher dated June 24, 1907, and reads, in the statement of account:

"For cutting and delivering granite for portion "C" of the South pavilion of the building for the National Museum, to date, in accordance with contract of October 23, 1906, $3,879.05
Less 10% reserved as per terms of contract, 387.91

$3,491.14"

The contract called for 10% to be reserved from all payments until the completion of the contract. Ten per cent. here was $387.91, and that left $3,491.14 and that was the first payment, as stated, on account of that contract. That voucher is certified to as to the articles that had been received, that they had been received in good order and in quantities above stated, and that certificate is signed by F. R. Freas, Master Mechanic of the Museum Building.

The voucher is also certified to as follows:

"I certify that the articles above enumerated have been received or services rendered; that they were necessary for and have been or will be applied to the construction of the "Building for the National Museum," and that the prices paid were, in my opinion, just and reasonable, and that the purchases were made under contract, in compliance with Section 3,709 Revised Statutes.

(Signed) BERNARD R. GREEN,
Superintendent of Construction.

That is my signature. The other signature, that of F. R. Freas, is his signature, which I know and recognize, and the receipt for this money is signed by Mr. Frank F. Graham, the contractor, the receipt reading:

"Received, at Washington, D. C., this 27th day of June, 1907, from Bernard R. Green, Superintendent of Construction, the sum of three thousand four hundred ninety-one 14/100 dollars, in full payment of the above account.

(Signed in duplicate.)

$3,491.14

(Sign here) FRANK F. GRAHAM.

"Paid by check on United States Treasurer, No. 746,-651, dated June 27, 1907, to order of Frank F. Graham.

That is the face of the voucher. The back of it is a filing brief which states that this is for the Building for the National (183) Museum. Voucher No. 241, and it gives the name of the payee, Frank F. Graham, and the amount of money, $3,491.14, is given again on the back of the voucher, and it is stated that it comes from the appropriation for the building for the National Museum.

Q. That is the character of all of the vouchers, and you do not need to have all of the details read. So far as the Graham vouchers are concerned you need not read them all through, except that one.

The COURT: There is no difficulty about the payments made to Graham?

Mr. HILL: These payments were made to Graham.

The COURT: About that there is no difficulty.

Mr. HARLEY: We would like to have the vouchers, all of them. He is producing the vouchers, and we will not want him to read them all, so far as Mr. Graham's vouchers are concerned, but we would like to have each one produced.

Mr. MCLANAHAN: If your Honor please, they made a question a little while ago as to whether or not Mr. Graham had been paid in full for the work he did. Each of these vouchers shows a certain payment to Mr. Graham, and all the payments to him are shown by these vouchers.

Mr. HARLEY: We do not want all the vouchers read, but we think it would be well to have them produced.

Mr. HILL: Mr. Graham's certificate is on each voucher that that is in full payment of the amount due him at the time.

Mr. HARLEY: Let us see each one of them.

Mr. MCLANAHAN: Yes.

The COURT: Have you the voucher for the last payment made to Mr. Graham?

Mr. HILL: Yes, sir; we have it here.

(The last voucher referred to was here handed to the court.)

Mr. HILL: Your Honor, there is a little change in the form of the voucher that we wish to explain. Here is voucher No. 966. I will take that up next.

By Mr. HILL:

Q. I hand you voucher No. 966, to Frank F. Graham for $3,813.80. Please read that to the jury and explain how (184) that is made up, with reference to the other voucher. A. This is the second voucher in the series of these payments, this being voucher 966. It was made under date of July 24, 1907, and reads: "For cutting and delivering granite for portion "C" of the South Pavition of the building for the National Museum, to date, in accordance with contract of October 23, 1906, $8,116.60. Less 10% reserved as per terms of contract, $811.66. June 27, by cash on account, per voucher No. 941, June quarter, 1907, $3,491.14". That last amount, together with the 10 per cent. deducted from this present payment, amounts to a total of $4,302.80, which subtracted from the total amount to date leaves a net amount to be paid on this voucher of $3,813.80, making the second payment on account of this contract. It is also certified by Mr. Freas, master mechanic, that the articles were received in good order and in the quantities above stated, and it is certified by myself as Superintendent of Construction, and there is the receipt for the amount of money by Frank F. Graham. These are the correct signatures.

I will explain that this being the second voucher, and it will be the same with all the succeeding ones of this series, that the full statement or account to date of the payment will be on the voucher; that is, the vouchers contain the account each time cumulative, so that on the face of each voucher you

will see the whole account up to date. This now shows two amounts, because it shows the amount to be paid now and the amount that was paid on the first voucher; so that the total up to date is $8,116.60, from which is deducted the 10 per cent., and the payment that had been previously made, making a total net payment on this particular occasion of $3,813.80. Now, all the vouchers in the series refer to the whole account, proceeding down to that point.

The COURT: Now you might take up the last one.

Mr. HARLEY: How is that?

The COURT: You might skip to the last one.

Mr. GAITHER: I suppose there will be offered here all of them. We do not care to have them all read.

Mr. HILL: After offering two more vouchers, there is an explanation we wish to ask the witness to make.

Mr. GAITHER: I just suggested that to facilitate matters.

(185) The COURT: How is this amount charged for, as work having been in each particular period?

The WITNESS: Yes, sir.

The COURT: How was that made up

The WITNESS: That was made up by the amount of work actually done, the amount of stone finished and delivered up to date. The quantity of stone is measured generally by cubic feet.

The COURT: Was that done by your inspectors?

The WITNESS: By my inspectors and my clerks and the foremen on the job, and all.

The COURT: And assented to by Mr. Graham?

The WITNESS: Yes, and assented to by Mr. Graham. The account is made up and is signed in full receipt up to date by Mr. Graham. That is the method in which all the accounts and payments were made and kept throughout the whole work. The theory of it was simply this. The stones in the building were of infinite variety of shapes and sizes and the basis of all the calculations and payments was the cubic feet of the stone

in bulk. The total quantity of cubic feet up to date finished and delivered was measured up and a multiplier in the way of price, $2.50, was found to be about the average price of all the stone in the entire job, and that multiplier as a unit of price was used in making up each of the payments; so that the total amount could not be more than the total amount of the contract, nor could the total amount be more than the total amount of the stone on the job, which is all shown in the plans and described in the specifications, and all that; so that the progress payments were made on a general basis which would lead up finally to the total. I think that possibly may be clear to the jury and to all.

The COURT: Then I understand you assumed as an average cost $2.50 a cubic foot?

The WITNESS: $2.50 a cubic foot, yes, sir.

The COURT: And you paid Mr. Graham for the amount that he had finished at that rate?

(186) The WITNESS: Yes, sir, up as far as these vouchers went. We might possibly have changed the rate of payment a little later on if, by experience, we had found he would be entitled to a little more or of we felt that he might not be entitled to so much.

Mr. GAITHER: Your Honor, is this in answer to a question? We have been looking at a voucher which was handed to us here to examine, and we have not been listening to all this talk.

The COURT: What the witness has been saying is explanatory. How often was Mr. Graham paid?

The WITNESS: He was paid as often as there was anything due.

Mr. MCLANAHAN: The contract says that the payment should be as the work progressed.

The WITNESS: Yes, sir.

The COURT: That is explanatory.

Mr. GAITHER: Yes, sir.

The COURT: The contract said that Mr. Graham should be paid as the work progresses; and you assumed as a fair unit price $2.50 a cubic foot?

The WITNESS: Yes, sir.

The COURT: Although that might have been rather too little in some cases and too much in others?

The WITNESS: Yes, sir; one stone he might be cutting today would not be worth more, maybe, than $1.50 a foot, possibly, aright alongside of that cutter on the same job might be another man that might be worth to the contractor to cut $4.00 a foot, for all I know; but they averaged up, so that the total amount of the whole contract being based on an estimate of the total amount of cubic feet, the stones being taken as they came in the whole contract, by simple division we averaged the price at about $2.50 as a price that the whole thing was worth. That was for the benefit and convenience of the contractor as far as possible. It did not make a bit of difference for the Government so long as we looked out that we were not paying for more than we got, from time to time. We were willing, of course, to have paid Mr. Graham every day if there was anything for him to be paid for.

Mr. GAITHER: Just a moment. We would like to have this conducted in an orderly manner your Honor.

(187) The COURT: I do not see but it is perfectly orderly. He is explaining how the amount of each voucher is arrived at. The total amount of the contract was for a lump sum, and they put an estimate on each payment for the work which in the end they thought would come out at $149,000, the total of his contract.

Mr. GAITHER: That is done by dividing the number of cubic feet into the amount of money. There is no trouble about that.

The COURT: Except as the witness explains that some of it was more costly than other parts.

Mr. GAITHER: But that is not for the Government to consider, because the total number of cubic feet Mr. Graham was to furnish was specified and for that he was to receive $149,000.

The COURT: They estimated the number of feet on the whole contract.

Mr. GAITHER: Yes, on the whole contract.

The WITNESS: It was done to facilitate the payments to Mr. Graham. It was for his benefit. We did not care whether we paid the money out today or two or three years hence.

Mr. GAITHER: I move to strike out that statement, that it was for his benefit. It was certainly for the benefit of the United States also to see what they should pay on this contract, and not alone for the benefit of the contractor. They must ascertain also for their own interest.

The COURT: He says that he did.

Mr. GAITHER: He says that it was for the benefit of Mr. Graham.

The WITNESS: It was wholly for his convenience. We were willing to aid him in any way possible. That was certainly a benefit to him.

The COURT: Proceed.

By Mr. HILL:

Q. I hand you voucher No. 1,005 to Frank F. Graham. See if that is your signature and if that is a correct voucher? A. This is voucher No. 1,005 for the third payment in the series, made up August 14, 1907, and the statement at the head is the same for the estimate amounting to $11,549.08. That is the estimate of the whole amount delivered up to this date. From that is subtracted 10 per cent, reserved, $1,154.91, (188) and this is credited by the two previous payments, the first of $3,491.14 and the second of $3,813.80, which added to the percentage of deduction gives a total of $8,459.85 to be subtracted from the total estimate of $11,549.08, leaving a net payment in this voucher of $3,089.23. This voucher is certified in the usual way, the same as the other vouchers, and is receipted by Mr. Graham over his own signature for the amount which was paid to him by check.

Q. Now, will you explain, please, how the amount of these payments was arrived at? A. I thought I had already stated that.

The COURT: He says that he has not arrived at it accurately, but it was a mere estimate.

Mr. HILL: We just want to show what basis he went on, namely, the amount of cubic feet he estimated were in the

contract, and then how he got at it, as the basis on which he based his estimate of payment.

Mr. GAITHER: He has already asked the witness a question on that.

The COURT: I understand they made an estimate, taking the amount of the contract, $149,000, and the rate of $2.50 a cubic foot for the cutting of the stone, and proceeded on that theory and paid him from time to time at that rate. Now, whether in the end it would come out all right or note is another question. It might turn out they had paid him too much at any particular time, or they had paid him too little.

The WITNESS: We did pay him too much in the earliest payments, because he cut the cheapest stones first, and at the rate of $2.50 a cubic foot, he was paid too much for cutting these stones; but it would not go very long before it would even up by the average coming on the other side, and we were willing to proceed in that way for the sake of convenience. It was only a slight overpayment at any one time, and he might be slightly underpaid later.

The COURT: What is the question?

By Mr. HILL:

Q. How many cubic feet did you estimate on in the con-
(189) tract? A. We estimated about 60,000 cubic feet.

Q. I hand you voucher No. 1015, made up September 4, 1907, to Frank F. Graham. Please look at that and read this portion here (indicating)? A. This is voucher No. 1,015 made up on September 3, 1907. The estimated total amount delivered to that date is calculated to $14,458.01. Ten per cent. is reserved in the statement of account, and the previous payments, net payments, are added in, making a total of $11,-839.97 to be subtracted from this total amount, leaving a net payment on this present voucher of $2,618.04. This forms the fourth payment on this account. This voucher is certified to by the Master Mechanic and by myself and is receipted by Mr. Graham in the usual manner of auditing vouchers.

Q. I hand you voucher No. 1,047 dated September 23, 1910, to Frank F. Graham, for $2,821.50. Please look at that and see of that is your signature, and if that is Mr. Graham's signature, and if so, read that portion? A. This is voucher No. 1,047 in the series, made up on September 23, 1907, on a total estimate to date of the value of $17,593.01. From that there is subtracted 10% reserved as per the terms

of contract, namely, $1,759.30, and previous payments, on June 27, $3,491.14, on July 24, $3,813.80, on August 16, of $3,089.23, and on September 4 of $2,618.04. The total to be deducted from the full estimate is $14,771.51, leaving a net payment on this voucher to be made of $2,821.50, this being the fifth payment on account of the contract. This is certified to by Mr. Freas and certified to by myself with the proper signatures, and is signed in receipt by Mr. Graham, the receipt reading this way:

"Received at Washington, D. C., this 26th day of September, from Bernard R. Green, Superintendent of Construction, the sum of $2,821.50." That is signed "Frank F. Graham."

Q. I hand you voucher No. 1,051, dated October 10, 1907, in favor of Frank F. Graham, for $3,509.00. Please look at this voucher and if you find it different in form from the vouchers you hold in your hand, please explain fully to the jury the difference in the form of these two vouchers. A. This voucher No. 1,051, for the sixth payment in the series to Mr. Graham, made up on October 10, 1907, is "For cutting and delivering granite for portion "C" of the south pavilion of the Building for the National Museum, to date, in accordance with contract (190) of October 23, 1906, is for $21,491.90. From that amount are subtracted the following amounts:

"Less 10% reserved as per terms of contract,	$2,149.19	
June 27, By cash on account,	$3,491.14	
July 24, " " " "	3,813.80	
Aug. 16, " " " "	3,089.23	
Sept. 4, " " " "	2,618.04	
27, " " " "	2,821.50	$17,982.90"

That leaves a net payment to be made on this voucher of $3,509. In this voucher in which the printed form that is used is modified, it is modified in this way, that instead of Mr. Graham, the creditor, signing on the face of the voucher in receipt for the money, he certifies in this way:

"I certify that the above bill is correct and just and that payment therefor has not been received. (Not to be signed in duplicate.)

FRANK F. GRAHAM."

This voucher is certified by myself in the usual way for this amount of money, and it states at the bottom of the voucher that it was paid by check to the favor of Mr. Graham, the check being No. 216,763, dated October 10, 1907, in amount of the

voucher, $3,569. This change in form was made because of an order that proceeded from the Treasury Department just prior to the payment of this voucher.

Mr. HARLEY: Just a moment, no one has asked that question.

Mr. HILL: I asked that question. He is explaining how the change came to be made in the voucher.

The WITNESS: It was made by order of the Treasury Department, under whom I have to act as disbursing officer in all the details of account keeping and auditing that are imposed by law through the Treasury Department. The Treasury Department, up to that time, just before this voucher was made up, had taken receipts for all its payments by signature of the payee on the face of the voucher, which read, "Received of so and so"—Mr. Frank F. Graham in this case. Now the vouchers were to be made out, and this one was received with the payee's certificate that the account was correct and that he had not been paid the money; so that the voucher up to that point having the signature of the payee on it, was a correct and certi-
(191) fied—that is, certified by the payee—statement of the account. Then when the check which had to be issued by myself, I being the disbursing officer, to Mr. Graham, had been received by him in payment of the account, it was necessary, of course, that it should be paid to order, always, it was necessary for him to endorse the check as he had always had to do before, but in this case and in all the accounts afterwards, the check went back to the Treasury as usual, through the bank, for deposit there, but then the endorsed check was used in the Treasury as the receipt for this voucher. The check states the number of the voucher and connects itself by its own features with the voucher, and when it got back to the Treasury the Treasury filed it with the voucher always, and that is the way all the accounts have been kept since, so that the endorsed check in payment of any account becomes the receipt for that account from the payee and is filed in the Treasury Department, or rather in the office of the Auditor for the Treasury Department, which auditor has to do with these questions of accounts. So that the rest of the vouchers from that time on will be found to have been paid in that way; instead of having the vouchers here to show the receipt for the money by the payee, we will have to have the checks with the vouchers to complete the account and to show the complete certificate. This voucher was paid October 10, 1907, and the subsequent vouchers will be found to have been certified by Mr. Graham in the same way, the certificate reading as I have already read

here. There is a printed instruction in parenthesis, here, from the Treasury Department, which reads:

"Certification and bill to be completely filled in by payee, or before signature by payee, without alteration or erasure at any time."

Then follows the certificate:

"I certify that the above bill is correct and just and that payment therefor has not been received."

That is the printed form of the voucher, and that is used on all vouchers, no matter whether it is stone work or cotton cloth purchased. That certificate is signed by Mr. Frank F. Graham.

Mr. HILL: I am going to offer all these in evidence.

(192) (The voucher referred to was here examined by counsel for the defendants.)

(It is hereby agreed that the original vouchers hereinbefore and hereinafter referred to may be used before any court in the argument or at the hearing of this case.)

The COURT: There is nothing very mysterious about that. It certifies that the bill is correct, and then the payee does not receipt it, but he endorses the check, and that is considered his receipt.

The WITNESS: It is not a peculiarity of the accounts in this case, but it is the general practice of the Treasury Department throughout the whole country. Thousands, if not millions, of checks are being made that way.

The COURT: I think it is a growing custom that the endorsement on a check shall be received as the receipt for the amount.

The WITNESS: Yes, sir.

By Mr. HILL:

Q. I now offer vouchers Nos. 1,083, 1,087, 1,122, 1,153, 1,177, 1,187, 1,206, 1,255 and 1,256. I hand you those vouchers Mr. Green, and ask you to please look at them and see if they

bear your signature and that of Mr. Graham? A. (After examining vouchers) All these vouchers are the vouchers in the account; they have the signatures of Mr. Graham and myself.

Q. I hand you voucher No. 1,292, dated March 6, 1908, to Frank F. Graham. I ask you to look at this voucher and, if it bears your signature and that of Mr. Graham, to read the whole voucher to the jury? A. This is voucher No. 1,292.

The COURT: I understand that is the last one of the vouchers for the payments made directly to Graham?

Mr. HILL: That is for the last payment made directly to Mr. Graham, yes, sir.

A. (Continuing) This is the last voucher in the series No. 1292. It was made up on March 6, 1908. At that date the estimated value of the stone delivered by Mr. Graham, finished and delivered according to contract, was $66,000. From that the 10 per cent. reserve is deducted, and all of the cash payments that have been made before on the account, the items being as follows:

(193)

"Less 10% reserved, as per terms of contract,		$6,600.00
1907		
June 27,	By cash on account,	3,491.14
July 24,	" " " "	3,813.80
Aug. 16,	" " " "	3,089.23
Sept. 4,	" " " "	2,618.04
27,	" " " "	2,821.50
Oct 10,	" " " "	3,509.00
25,	" " " "	2,655.54
31,	" " " "	1,766.25
Nov. 16,	" " " "	6,475.50
Dec. 6,	" " " "	6,660.00
20,	" " " "	4,500.00
1908		
Jan. 4,	" " " "	3,600.00
24,	" " " "	5,400.00
Feb. 13,	" " " "	4,500.00
14,	" " " "	1,800.00
		$63,300.00

That total subtracted from the total estimate of $66,000 leaves a net payment on this voucher, which is the sixteenth payment on account of the contract, of $2,700. It is certified as correct, and Mr. Graham certifies that payment has not

been received by him. This is his signature. It is also certified by himself as a correct account, &c., and this is my signature as Superintendent of Construction. The check is payment of this was No. 717,006, dated March 6, 1908, on the Treasurer of the United States, in favor of Frank F. Graham, for $2,700.

Q. Were any further payments made to Mr. Graham after that voucher? A. There were none.

Q. Why not? A. There were none paid because there was no further work done by him and therefore he was not entitled to any further payment. He abandoned his contract and it was annulled. Under its terms as the contract states I (194) was after that debarred from making any further payments to him.

Q. Does Mr. Graham's name appear on that voucher? A. Yes, he has signed it. This is his signature.

Q. In what connection does that appear? A. He has signed it in certification that the account stated in this voucher is correct and just, and that payment therefor has not been received.

Q. I hand you voucher No. 1,333 dated April 4, 1908, for $175, in favor of William Pirie. Please examine this voucher and state if this is your signature upon the voucher, and read it to the jury.

Mr. GAITHER: We object to that unless it is proved first that these services were rendered by Mr. Pirie.

The COURT: I will take it subject to exception.

Mr. GAITHER: May it be understood that all these vouchers are in evidence in the same way, all subject to exception?

The COURT: It will be understood that they are taken subject to exception.

Mr. GAITHER: I mean, if your Honor will allow that note to be entered upon the record, that they are all taken subject to exception, we will not have to renew our objection to each one.

The COURT: That will be so understood. Proceed.

The WITNESS: This is voucher No. 1,333, paid by me on the Graham contract to Willian Pirie, and it reads, "For services rendered as inspector of granite cutting for the south

pavilion"—of the building for the National Museum—"from March 1, 1908, to March 31, 1908, inclusive, thirty days, at $175 per months, $175." On the face of the voucher are the following remarks under the read of "Remarks":

"March 8-28, inc., 1908, 20 days at $175 p. m., $116.67 of the amount of this voucher charged against the contract of Frank F. Graham, dated Oct. 23, 1906, for granite work for the south pavilion, being for materials purchased or services rendered in connection with the completion thereof by the (195) United States."

That is a stamp that was put upon all vouchers afterwards paid on account of Mr. Graham's contract so as to identify them with that work which was then taken up and was in the hands of the Government to complete according to the terms of the contract. The amount of the voucher is $175.

Mr. HARLEY: Is that all in there?

The WITNESS: That is all stated on the voucher.

Mr. HARLEY: Are you reading that from the voucher?

Mr. HILL: If you will read my question, you will understand what he is doing. I will ask the stenographer to read my question.

Mr. GAITHER: I know, but we have to understand it as well as your question. I think when he is asked to read the voucher he certainly should not comment on that voucher.

The COURT: He said he was explaining it to us.

Mr. GAITHER: We cannot tell when he is reading from the voucher and when he is explaining.

The COURT: I understood him first to read what was stamped upon the voucher and then to proceed to explain something in connection with it.

Mr. GAITHER: I understood he was reading the stamp, and then he started to explain it.

The WITNESS: I will read the stamp, and start back at that point. Under the printed head "Remarks" there is the following:

"March 9-28, inc., 1908, 20 days at $175 p. m., $116.67 of the amount of this voucher charged against the contract of Frank F. Graham dated Oct. 23, 1906, for granite work for the south pavilion, being for materials purchased or services rendered in connection with the completion thereof by the United States."

That is the voucher. Then this voucher is certified in the regular way as correct and just, by William Pirie, and he certifies that payment therefor has not been received, by his (196) own signature, which is on the voucher. The usual form of certificate is on the voucher also, signed by myself, Superintendent of Construction of the new Museum Building.

Mr. GAITHER: How much is the voucher, now?

The WITNESS: $175.

Mr. GAITHER: Charged against the account?

The WITNESS: The voucher shows the total payment to Mr. Pirie of $175. The portion of that charged to Mr. Graham's contract is $116.67. That is the reason of this statement on the face of the voucher. I will explain, if you will allow me, that Mr. Pirie was not employed all the time at Mr. Graham's expense. It was only so much of his payment as was chargeable against Mr. Graham, as is shown by this voucher, that was charged to Mr. Graham, and that is the reason I read that.

By Mr. HILL:

Q. I see upon this voucher the name of William Pirie. Who was William Pirie? A. William Pirie was the master stonecutter and inspector, and generally useful and needed man by my office in all this stonework, as well as other stonework, for which he was paid separately and independently, as shown by that voucher.

Q. Please tell the jury what services Mr. Pirie rendered in order to receive that $116.67?

Mr. GAITHER: Hold on; to your knowledge, now, Mr. Witness.

A. Yes, sir. I had him working upon the efforts to get the stone from Mr. Graham's yard. He had been inspector there previously, under his own contract. He, knowing all about the case, naturally was employed to go to the yard and make all the arrangements he could, and under my direction,

my own personal direction, to get the stone from Mr. Graham's yard which he was not willing to send us himself, as the correspondence has shown, and to make inquiries as to where we could get facilities for doing the work ourselves under the annulled contract, and making a variety of arrangements, throughout this whole time, for which he has been paid on this voucher, at Mr. Graham's expense, $116.67. Mr. Pirie is an expert (197) in all this business. He has been with me for a great many years, off and on, on all kinds of granite contracts, and he is a man in which I very safely put all trust to perform those duties.

Q. Do you know of your own personal knowledge whether or not he rendered the services referred to in that voucher? A. I do.

Q. Was the compensation a proper one? A. I thought so. I think so yet.

Q. I hand you voucher No. 1,339, dated April 8, 1908, to Bernard R. Green, for $4.65. Please look at this voucher and if you can identify it, read and explain it to the jury? Explain to them all the items in the voucher for which the payment was made, and the necessity of the payment? A. This voucher No. 1,339 was for a payment to myself of $4.-65. Perhaps I had better read the voucher first and say where I stop, and then go on with the explanation, so that they can draw the line correctly between my reading of the voucher and my remarks.

Q. Yes. A. The voucher, the whole thing, is—perhaps I may be safe in explaining it first—what we call a travelling expense voucher. The voucher is as follows: At the head of it is printed "Library of Congress. (Form approved by the Comptroller of the Treasury October 3, 1907) Voucher for travel expenses. Appropriation: Building for National Museum. The United States to Bernard R. Green, Dr., Address ————. For actual expenses, while travelling in the discharge of duty, from Washington, D. C. to Guilford, Md., and return for inspection of granite cutting plant in connection with carrying out the contract of Frank F. Graham, by the Government of October 23, 1906, as follows:

1908

April 7.	Railroad fare, Washington, D. C. to Laurel, Md., and return.	$ .90
	Lunch.	.25
	Carriage, Laurel to Guilford and return.— Voucher "A"	3.50
		$4.65"

"The amount of this voucher charged against the con-
(198) tract of Frank F. Graham, dated October 23, 1906, for granite work for the south pavilion, being for materials purchased or services rendered in connection with the completion thereof by the United States."

"(Amount of this voucher charged to the contract of Frank F. Graham, dated October 23, 1906.)

C 1,637 J. Q. S."

"J. Q. S." are the initials of my chief clerk, John Q. Sheehy.

Q. Is he present in court? A. He is: "C. 1,637" are hieroglyphics which I can not explain. Perhaps Mr. Sheehy can explain them. Then follows:

"Oath or Affirmation of Claimant.

"I do solemnly swear that the above account and schedule annexed are just and true is all respects."

Mr. Harley: Is it necessary to have all this go in the record? He has explained that it is his own expense. It is not necessary, certainly to have this go in the record?

The Court: I do not think the certificate is necessary.

Mr. Harley: He has explained what it is for.

Mr. Hill: This is a different sort of certificate from that in some other vouchers. May I ask that he read it?

The Court: Proceed.

The Witness: There is an asterisk after the word "solemnly" which refers to something below. The certificates reads:

"I do solemnly swear that the above account and schedule annexed are and true in all respects, as verified by a memorandum kept by me; that the distances as charged have been actually and necessarily travelled on the dates therein specified; that the amounts as charged have been actually paid by me for travelling expenses; that I have not and will not receive directly or indirectly, from any person, agency, or corporation

any sums as rebate on account of any expense of transportation included in this account, that none of such distances for which charge is made was travelled under any free pass on any con-
(199) veyance; that no part of the account has been paid by the United States, but the full amount is justly due; that all expenditures included in said account other than my own personal travelling expenses were made under urgent or unforeseen public necessity, and that it was not, for the reasons stated herein, reasible to have payment made for such expenditures by the Superintendent of the Library Building and Grounds. So. help me God.

(Signature) BERNARD R. GREEN,
Official Title: Superintendent of Construction.

"Subscribed and sworn to before me at Washington, D. C., this 8th day of April, 1908.

[L. S.] JOHN Q. SHEEHY,
Notary Public.
My commission expires October 13, 1911."

By Mr. HILL:

Q. Is that Notary Public the Mr. Sheehy who you said was present in court today? A. The same, yes, sir. The embossed stamp of the notary is on the paper and inscribed "L. S." It reads, "I certify that the above account is correct and just"—

The COURT: I think that is enough of that.

By Mr. HILL:

Q. Are there any receipts attached to that voucher? A. The receipt referred to is attached, reading:

Laurel, Md., April 7th, 1908.

"$3.50

"Recd. of Mr. Bernard R. Green three dollars & 50/100 for double team.

ELWOOD N. FISHER."

Q. Why was that necessary, Mr. Green, if it was necessary? A. It is, because in these accounts for travelling expenses the Treasury Department is very particular and exacting, and requires receipts in the shape of sub-vouchers to be rendered with the statements of accounts of travelling expenses, especially when it is possible to get them, and particularly for hotel (200) bills and the hiring of conveyances.

The COURT: You have not asked Mr. Green why he had to go to this place.

By Mr. HILL:

Q. Will you please explain why you went to this place? A. I went there to examine the more or less abandoned stone-cutting plant, sheds, machinery, tracks, and what not, of the Guilford—of that stone quarry, whatever the name was. Is it not stated on that voucher?

Mr. GAITHER: It is called the Maryland Granite Company.

A. (Continuing) The Maryland Granite Company. I went there to look up that plant with a view to its possible favorable adaptation to the carrying on of this contract of Mr. Graham. We were then looking, as I have stated before, and I went with Mr. Pirie—had him with me—and we were looking about for means and facilities, and proper ones, for the economical and expeditious continuance and completion of the contract that Mr. Graham had abandoned.

Q. Did you make use of that quarry? A. No, we did not. What do you mean, the works?

Q. I mean of the works? A. No, sir, we did not.

Q. Why not? A. Because in my opinion they asked too high for it, and the works were in more or less dilapidated condition and in an inconvenient situation, rather far out in the country, and the doing of the work by that means would require two freightings of the stone instead of one, which was avoided by doing it at the Museum Building, as I did later, and repairs would have to be made, and altogether it did not seem to be at all economical and favorable in the interest of Mr. Graham as well as of the Government. My effort was to do the work as cheaply as possible. That was the main thing. Expedition was not so much of consequence or the purpose as the cost. Therefore we did not go any further, after careful examination of those works with that object.

The COURT: Proceed.

(201) Q. You have testified that you made an examination of the yards at Guilford, but did not take them for the Government because they were too expensive. Where did you carry out the Graham work? A. On the grounds of the new building at the National Museum; the building that was to use the stone.

Q. Please state to the jury what organization you had for carrying on this work after the Government undertook the contract, and the general manner of the completion of the Graham contract under your direction? A. I organized at the building in the grounds, within the fence surrounding the new building, a stonecutting gang, as they call it, generally, an organization of stonecutters and a few laborers, derrick men—one or two—engineers and some blacksmiths and a carpenter or two, and a draughtsman whose presence always is needed at a stonecutting plant for making the stonecutters' diagrams from the drawings, and a master foreman and one or two sub-foremen. I put up some sheds, the few that were necessary, getting the lumber for it and buying some tools, a few, and that formed the organization in connection with the Government plant that was already there. There was a master mechanic of the whole building, whose services were not charged to Mr. Graham, a clerk or two there, and my own clerical organization in the Library of Congress, whose services were not charged to Mr. Graham, and part of my office, and all the business was done without cost to Mr. Graham, in connection with my business. I had to carry on all this work and I took it in naturally as a part of my own organization, and only charged to Mr. Graham the work that was actually done especially for him, not charging him for the work that was done by my chief clerk in all these accounts, Mr. Sheehy, to whom I referred; he received nothing extra. He was the chief clerk of the whole building of the New Museum, in my office. All the correspondence, all the necessary calculations, many of them, and the making up of accounts and paying accounts and everything of that kind was done as a part of my office organization at the Library where my headquarters are, or were at the time, and that formed the organization and the outfit for doing this (202) work on Mr. Graham's account. He was only charged with what was actually expended on his account, and not with all the work done on his account, by any means, because that clerical work was done, as I have explained, by my regular clerical organization, and in addition to their regular services. The purchases, of a little lumber now and then, a little steel or a little bit of rigging, a grindstone, a blacksmith's forge or two, were made on Mr. Graham's account of course;

those things were charged to him. That was the working force for carrying on the work; sometimes more men and sometimes less, in accordance with the conditions of the work and the weather and the conditions around the building. Much of the stone was cut inside the building. It was a very large building and had a roof on it at the time, or at least enough of it to protect the basement, and many of the stones were cut in there, and it was not required to buy any sheds or pay for shelter outside. Very much of the work was done in the summertime. So we managed to get along with the minimum of expense for that sort of thing. The men were able to work pretty well regardless of the weather. Some shelters were put up, some of boards, with simply a shed roof, and some cotton cloth spread over head to keep the sun off, and that is about all the plant that was at the building for doing this job. The matter was almost wholly the cutting of the stone. The getting of the stone to the Museum Building for the purpose was a matter of freighting from the quarries in Vermont, where, according to the original contract, the stone was to be put on the cars for Mr. Graham, and his contract was, as the contract states, to pay the freight and take the whole matter of freighting into his own hands from the quarry where the stone was placed on the cars to his own cutting yard. That was changed by taking the work over the National Museum Building itself, so that there was only one freight rate to pay practically. The freighting was direct from the quarry to the building and there was only one loading and one unloading, instead of two, as there would have been if the stone had gone on to be cut at Mr. Graham's yard, or any other yard outside that building. The stone after it had been cut and dressed must have been and would have been packed for shipment and protected by boxing up the stone, protecting the fact by boards, and that would have required boards and galvanized iron nails, and so
(203) forth, and that would have had to be done for the freighting of it from where it was cut to the Museum. All of that was saved by doing the work at the Museum directly by the Government, and therefore Mr. Graham did not have to be charged with such expenses. When the stone was cut and finished, it remained right at the building, just as if it had been landed there and even better to some extent than if it had been landed there—by a contractor outside sending the stone there, and he saved the cost of boxing, and it was already for us to take hold of and put right on the building. That necessitated a payroll of workmen, as is usually the practice in such operations, and the paying for supplies that were necessary for that particular work. As I say there was steel and

a little lumber, and there were grindstones and forges and those things. What was left of them is there at the building yet, for Mr. Graham's benefit when he has finally settled up, if he wants them. So that there is some credit to come back to him. But that involves a series of expenditures that are charged against Mr. Graham's account, and make up the total cost of the work that is charged to him in this presentation here.

Q. After you had been to Guilford, and before you determined to conduct the stonecutting at the building, were any further steps taken to find a cheap and suitable place for the work to be done? A. There were. We looked all over Baltimore and Washington, as well as these more or less distant works that I have already described, at Guilford, to find a suitable plant that could be had for a reasonably economical expense, in order to save at the building the incumbrance to the building of the operations, of having all this work going on immediately surrounding it, and we made that search without success, and finally felt, after considering it—all this was a new undertaking, you understand, the undertaking to carry out such an enormous piece of stonecutting as this at the point where Mr. Graham left it. He had done only about one third of the work or probably only one fourth of the actual cost of the stone to be cut to complete the whole job, because he had done rather the cheaper part of it first, the smaller stones and the plainer ones, and there was yet to come the cornice work and the columns and the more elaborate part of the stonework, (204) as appears on that drawing—on that picture. The cutting of these columns (indicating on photograph, Plaintiff's Exhibit No. 4) was difficult work. They are all fluted; they are all large and heavy, and the pilasters in behind are heavy, and the work on the ceiling of the portico is difficult work; it is elaborately enriched with mouldings, and those are large stones. That had not been done when Mr. Graham stopped, and it involved this cornice work around here, which is very elaborate, and that up around there (indicating on photograph). What he had been cutting was the plainer parts, up here, on the plain wall (indicating). By looking at that building across the way there, again, you can see what I mean, by comparing the portico, the elaborate work that is in there, with the plain work on the stones of the wall, not counting the window caps, but the plainer sides. That plain work was cheaper, and more rapidly done than the other. So that what I wanted to say was that the work we had to do was so elaborate and so expensive as to encumber the ground all around this great building so as to interfere with operations on the building, and it was

very undesirable to have it done there. The Government while the work was going on wanted to use the building; there came up a use for the building; Congress wanted to give the use of the building to the celebrated International Tuberculosis Congress, and they in their deliberations inside of the building—

Mr. HARLEY: What has all this to do with this case, your Honor?

The WITNESS: I was only explaining that it was desirable to avoid doing this work around the building there, instead of somewhere away from it, for the convenience of the Government.

Mr. HARLEY: You did not want to do it there?

The WITNESS: No, sir.

Mr. HARLEY: You did not want to do it in Washington?

The WITNESS: No, sir. I did not want to do it there, and we did use efforts to find some other place before we did it there.

Mr. GAITHER: Did the Tuberculosis Congress occupy the (205) building before you put the roof on?

The WITNESS: No, the roof was on at this time, on the main building. I was talking about the south pavilion, which had not any roof on it, because he had not got the stone cut to make if of. But on account of economy and for other good reasons, for the benefit of the work—Mr. Graham's contract, particularly—I decided to carry on the work at the building. That was the organization, and the expenses that were paid for doing that are in this list that has been made up, with the vouchers to sustain the account.

Mr. GAITHER: We will let him testify to this voucher, but we want all these vouchers in subject to exception, and we want the witness to remember that he must only testify of his own knowledge as to any work done.

Mr. HILL: I think he has been testifying of his own knowledge.

Mr. HARLEY: So far he has only been testifying to what he spent himself, $4.65.

By Mr. HILL:

Q. Here is voucher No. 1,365, May 2, 1908, "appropriation for building National Museum". The amount of this voucher is $6,530.83. Please examine the voucher and state what, if any, portion of this amount of $6,530.83 has been charged against Mr. Graham on account of his contract?

Mr. GAITHER: Mr. McLanahan has just told me that $3 is all that was charged against him out of that total.

The WITNESS: Here is a set of eight sheets forming voucher No. 1,365, for the building of the National Museum. It is a pay roll on the general building for the National Museum, for all parts of it, regardless of the specialty of Mr. Graham's contract. This is a payroll for people employed on the general construction of the building. The whole amount of it is $6,530.83. This is certified by myself as Superintendent of Construction and as disbursing officer. On this voucher, which contains 177 names of employees, there is shown each person's time and rate of pay and the amount due each person for this month on this period as stated in the voucher, and signed by (206) him in receipt in a column of signatures, in receipt for the money. On it is the account of one J. T. Waters. During two days of the time that he is credited for on this voucher and for which he signs, he was employed on the account of Mr. Graham. This is for the month of April, 1908, the second half of the month of April. That is, they make up the payrolls twice a month, for the first half and the second half, and this is for the second half of April, 1908, and on this whole voucher containing 177 names is this one name of J. T. Waters, which is No. 113 on the voucher, whose times for those two days, although put upon this roll of the rest of the people on the Museum building, was employed on this contract of Mr. Graham's.

Mr. GAITHER: Do you know that personally?

The WITNESS: I only know it by the accounts, the same as I have to depend—

By Mr. HILL:

Q. Is there anything on this voucher to show that this man Waters received any money? A. Yes, the voucher contains his signature for the whole amount due him for that month, and on this is printed the same statement in a stamp

referring to Mr. Graham's contract, which was on the previous voucher, and which explains itself.

Q. Please state whether there is anything in that pay roll which shows that this man Waters received that sum

The COURT: He signed for it.

Mr. GAITHER: Certainly, he signed for it.

Mr. HILL: Yes.

The COURT: And Mr. Green paid the money.

Mr. GAITHER: He says he does not know anything personally about it, himself.

Mr. HILL: He says that he paid the money.

(207) The COURT: He paid the money. You have the statement there This is only to prove that he actually paid the money and paid it on account of this.

The WITNESS: That is shown on the pay roll, if you wish to go into that evidence.

Mr. GAITHER: May it please your Honor, I think we are entitled to this proposition, that unless he knows something about it, all that he can testify to is that he made this payment, and he can not testify to something in his favor by something put there by his own people.

The COURT: He stated why it was he paid it. Now he says he paid it because it was certified to him that it was on account of this contract.

Mr. HILL: I want him to show this on the payroll.

The WITNESS: I want to find No. 143 on there. Here it is. No. 143 on this payroll is out of its serial order. It (208) is among the four hundreds.

The name on this payroll is "J. T. Waters, laborer." He worked at $1.50 a day. And the amount paid to him was for two and five-eights days' work, $3.94. The receipt for it is in his own signature in the proper column, and in red ink is written, 2 days, $3.00 charged against contract of Frank F. Graham of October 23, 1906." Then here at the bottom of

the whole series of sheets, on the last sheet in the series, there is this note inscribed:

"2 days' time of J. T. Waters, No. 143, on this voucher, amount $3.00, charged against the contract of Frank F. Graham, dated October 23, 1906, for granite work for the south pavilion being for materials purchased or services rendered in connection with the completion thereof by the United States".

The accounts are carried through the whole job with that minuteness of records and reference.

By Mr. HILL:

Q. That is enough, on that. Here is voucher No. 1,367, dated May 6, 1908, for $175 in favor of William Pirie.

Mr. HARLEY: Is this another one to Mr. Pirie?

Mr. HILL: Yes.

Mr. HARLEY: This, like the others, goes in subject to exception, as I understand.

The COURT: Yes.

By Mr. HILL:

Q. Please look at this voucher No. 1,367, and if you know anything about it, state whether those services were rendered, to your personal knowledge, and if so, what they were? A. This voucher, No. 1,367, is a voucher that I know about. It is a voucher of William Pirie as inspector of granite cutting for south pavilion, for $175 for the month of April, 1908. It is certified by Mr. Pirie in his own signature as correct and just, and he certifies that payment therefor has not been received. It is certified by myself, that the foregoing account is correct, and so forth, to my own knowledge.

Q. What services were rendered by Mr. Pirie? A. The gen-
(209) eral services in the command of this operation that was going on around the new Museum Building, receiving the stone there, having it cut, employing the men and seeing that he and his assistants did their duty and performed the work necessary for carrying out this stone cutting contract.

Q. Where did you say he performed these services? A. At the building for the Museum.

Q. Do you know personally that he rendered these services? A. I do. I used to go there frequently myself to be around the work, so that I saw *he* was going on myself, as far as it was possible for any one man to be on the ground all the time. Of course, I could not do that. I employed him the way I employ hundreds of people, as anybody else has to do. I knew he was there all the time at work, because I was frequently in communication with him by telephone and otherwise when I did not happen to be on the ground looking him in the eye.

Q. I hand you voucher No. 1,375, dated May 2, 1908, a pay roll for personal services. A. This is voucher No. 1,375. It is in two sheets, and is a payroll for the latter part of April—the latter half of April—1908, of the employees on account of Mr. Graham's contract about the building for the new National Museum. The number of individuals paid on this roll is 115. The total amount of roll is $315.76. These are the services of laborers, carpenters, blacksmiths, engineer, riggers, master rigger, master carpenter.

Q. Do you know anything about it yourself personally? A. I do. I know the men were there doing the work, because I frequently saw them at work. I frequently visited the building, almost every day. I was building the building itself, without regard to this stonecutting job going on right around it. That was one of the conveniences of having it right there, to offset some inconveniences I have mentioned, to have the thing under my own personal eye all the time so far as it was possible to; and furthermore, I was familiar with the work myself, and I know what the men were doing when I (210) looked at them, because I know about stonecutting and carpenter work and what enters into such work as that, having been engaged in it all my life.

Q. Is there anything on that pay roll to show that the persons stated to have received the pay did receive it? A. Their signatures are in the column of signatures opposite their respective names on the roll.

Q. I hand you voucher No. 1,380 dated May 11, 1908, of William Ballantyne & Sons, for one dollar.

The WITNESS: Ballantyne & Sons are stationers in Washington, D. C., and amongst the dealers there, and this is an account for a time book, "one 200 page No. 644 Standard monthly time book, $1.00." It was to be used in connection with the accounts in Mr. Graham's contract.

Q. I hand you voucher No. 1,381 dated May 12, 1908, for $29.40 in favor of Lansburgh & Brother. I will ask you

to go through this voucher in detail because it shows the course of procedure in getting bids for the Government under all these works, and a full explanation of this voucher will make it unnecessary to go fully into a number of the other vouchers that come later. A. This voucher No. 13381, made on April 25, 1908, is in payment to Lansburgh & Brother, who are drygoods dealers, and so forth, in the City of Washington, and it reads:

"For furnishing 140 running yards of unbleached muslin, 72 inches wide, in accordance with circular letter of April 17, 1908, competitive proposal of April 18 in response thereto and order =324 herewith, at the price of 21¢ per running yard——$29.40."

The account is certified by Lansburgh & Brother over their own signature as correct and just, and they certify that payment therefor has not been received. It is certified as complete and correct, and so forth, by myself as Superintendent of the building. It was paid by check No. 747,997, dated May 12, 1908, on the Treasurer of the United States in favor of Lansburgh & Brother, for the amount of the voucher, (211) $29.40. In order to prepare for this purchase, as is the practice and the rule in our Government work, I treated this work on Mr. Graham's contract as I carried on the work on the building itself for the Government. A circular was sent out by myself from my office at the Congressional Library on April 17, 1908. This circular was as follows:

"Circular

Unbleached Muslin.

BUILDING FOR NATIONAL MUSEUM.

Office, Superintendent of Construction,
Library of Congress,

Washington, D. C., April 17, 1908.

Gentlemen:

Please submit to the undersigned in writing *in duplicate* by Wednesday next, the 22nd instant, the price for which you would furnish and deliver, immediately on receipt of order, 140 running yards of Unbleached Heavy Muslin, 72" wide.

A small sample of the material proposed should accompany the bid.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

To that circular I received responses from all of the four parties invited to bid, of which the following is an abstract.

Office of
New Building for National Museum,
Library of Congress, Washington, D. C.

April 24, 1908.

Gentlemen:

Abstract of proposals received in response to circular letter of April 17, 1908, requesting bids for Unbleached Muslin:

Lansburgh & Bro.	21¢ sample =1
	24¢ sample =2
Woodward & Lothrop	28¢ yd.
S. Kann, Sons & Co.	28¢ yd.
Palais Royal	35¢ yd.

(212) The order has been given to Lansburgh & Bro., the lowest bidder, for 21¢ per yard.

Respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

That information was sent to each bidder for his information, and the order was accordingly given to Lansburgh & Brother. Their letter in making the bid, of which in their case that abstract contains a statement, is as follows: It is attached to this voucher.

"Lansburgh & Bro.,
Washington, D. C.

April 18, 1908.

Mr. Bernard R. Green,
Superintendent of Construction,
Library of Congress.

Dear Sir:

We will furnish as requested, =1, 8/4 brown sheeting for 21¢ and =2 8/4 brown sheeting for 24¢ as per enclosed samples.

Yours truly,

LANSBURGH & BRO.

An order was accordingly sent by myself to Lansburgh & Brother on April 22, 1908, on a regular form, as follows:

"BUILDING FOR THE NATIONAL MUSEUM.

Tenth and B streets N. W.
Office of Superintendent of Construction.
Library of Congress, Washington, D. C.
No. 324.

Return this Order
with your Bill
when rendered.

Lansburgh & Bro.,
=120 Seventh St., N. W.,
Washington, D. C.

Please furnish for this building, and deliver, 140 running yards, 72 inches wide, of unbleached muslin, *per* your sample No. 1, in accordance with circular letter of April 17, 1908, from this office, and your competitive proposal of April 18, which is hereby accepted, for the price of 21 cents per (213) running yard.

Deliver to 10th & B sts., N. W.,

BERNARD R. GREEN,
Superintendent of Construction.

There is a stamp on this order as follows:

"Please send separate shipping memorandum and separate bill for material furnished on this order, and mark them "for Contract No. 25";"

That is signed by myself as Superintendent of Construction. This is the original order, here. We have it here because by our rule of sending out such orders the contractor was required to return this order with the account for payment.

The COURT: How was that necessary for the work? How did it become necessary for this work?

The WITNESS: It was required for the purpose of sun shelters for the stonecutters working on the contract, outside of the building, on the ground.

By Mr. HILL:

Q. Why did you spend $29 to shelter the stonecutters from the sun? A. Well, one reason was to enable them to do more efficiently the work, under reasonable sun shade, in hot weather, than standing out in the sun; and as a second condition was, we regarded it as reasonable and fair to the workmen. But a third and rather important reason was that unless they were provided with shelter out of the sun, under the stonecutters' rules we would have had to pay them about $4 a day instead of $3.60 a day, which was what they were willing to work for, if we sheltered them. That is a condition of the trade, and we should have had to expend much more money for the cutting if we had compelled the men to work out in the open, subjected to sun and more or less to rain and other uncomfortable weather.

Q. Then do I understand you to say that if you had not put up these shades, you would have had to pay more per day according to the rules? A. Yes, we would have had to pay the cutters more.

Q. That voucher speaks of contract No. 25. What was contract No. 25? A. Contract No. 25 was the serial number of that contract according to the numbers made on the accounts in our office for the construction of the new Museum Build- (214) ing. This happened to be the 25th contract. We had to make contracts on that building up to some ninety, possibly, for various things, stone contracts and steel contracts and purchased *of* materials for the building and all kinds of things. This happened to be contract No. 25, and for convenience we simply called it by its number, and also we felt as if it was some consideration to Mr. Graham that we did not have the accounts parading Mr. Graham's name all the time in either large or small letters, every time a voucher went out or anything went abroad in connection with his contract; so, we merely called it privately, Contract No. 25." It is on the records and is easily identified.

Q. When you say contract No. 25, that is a short reference to what contract? A. To Mr. Graham's contract for furnishing and cutting the granite for the south pavilion of the new museum building, which contract he abandoned.

Q. Do you know of your own personal knowledge whether the muslin was ever delivered and used? A. I did not see it delivered myself. I saw it in use, many yards and expanses of it shining in the sun around the building, used for the purpose for which it was intended, for shelter for the stonecutters.

Q. But you did not happen to see it delivered? A. I did not happen to see it delivered. I saw it on the ground, and I knew they could not have gotten any anywhere else than through that contract with Lansburgh.

Q. And that contract was made after competitive bids? A. After competitive bids.

Q. I hand you voucher No. 1,391, dated May 19, 1908, in favor of Herman Hilbert, for $10. A. This voucher, No. 1,391, is an account for services rendered as a watchman at the granite yards of Frank F. Graham, in Baltimore, Maryland, from May 12, 1908, to May 15, 1908, inclusive, four days at $2.50 per day, amounting to $10. That was paid to Mr. Hilbert for those services, which were found necessary to guard the material that belonged to the Government, while remaining at the works of Mr. Graham in Baltimore—that is, (215) the granite yard.

Q. Why did you find it necessary to pay a watchman to guard the Government granite in Mr. Graham's yard? A. It was at the advice of the sheriff—the United States sheriff—believing it was advisable.

Q. You mean the United States Marshal? A. The United States Marshal, I mean; and there had been evidence observed by Mr. Pirie and others that some tampering seemed to be going on in the yard by unknown persons.

Mr. HARLEY: Just one moment. Do you know anything about that, yourself?

The WITNESS: I only know I was informed of that.

Mr. HILL: I asked him why he paid $10 for a watchman to guard the Government stock in Mr. Graham's yard.

The COURT: That is perfectly proper, he may answer.

Mr. GAITHER: It is proper to answer the question, but this witness has been told over and over again to confine himself to what he knows personally about these vouchers. Whatever he knows personally, let him testify to.

The COURT: He says it was reported to him that it was necessary under the circumstances to have a watchman.

The WITNESS: That is what I understood, and believing that was true, I paid the voucher for that purpose.

Q. I hand you voucher No. 1,393, dated May 19, 1908, in favor of the Merchants' Transfer & Storage Company, check

for $23. A. This voucher No. 1,393 in favor of the Merchants Transfer & Storage Company of Washington, D. C., was made up on April 16, 1908, and is for drayage on one boom derrick, with blocks, guys, and so forth, complete, and one steam hoisting engine, from the storage yards of the George A. Fuller Company, 25th and P Streets, N. W., to the new National Museum Building, in accordance with order No. 313, of April 15, 1908. That was certified as correct, and so forth, by the Merchants Transfer & Storage Company, by Mr. John L. Newbold, president, and it was certified by myself and paid by check No. 717,109, dated May 19, 1908, in favor of the Merchants Transfer & Storage Company, to the amount of $23.

(216) Q. Why did you pay $23 for drayage on one boom derrick? A. The derrick was required for handling the stone on account of Mr. Graham's contract. We had no derrick at the building belonging to the Government which was suitable for that purpose, and it was therefore necessary to hire one which we did from the George A. Fuller Company, large contractors over there, and this was in payment of the draymaan's account for hauling the derrick, and the hoisting engine, and so forth, from the yard of the Fuller Company to the building.

Q. Do you know of your personal knowledge that they performed this service? A. I do.

Q. I hand you voucher No. 1,394, dated May 19, 1908, for $2,849.35 to the Merchants Transfer & Storage Company. A. This is voucher No. 1,394, made up on May 6, 1908, in favor of the Merchants' Transfer and Storage Company, and the face of the voucher reads:

"For freighting (including car service charges at Mt. Clare, Md.) on rough granite belonging to the United States originally shipped from Bethel Vermont, and consigned to Frank F. Graham, in Baltimore, Md., to be freighted out and delivered for the south pavilion under his contract of October 23, 1906, which has been annulled, and reconsigned and reshipped from Balto., Md., to Washington, D. C., all as per receipted freight bills of the B. & O. Railroad Co., herewith, as follows."

There is a large string of bills here, all of which are attached to the voucher.

Q. You need not read those bills. A. The amounts are from $108 up to $165, and they total $2,849.35, which was

(217) paid to the Merchants Transfer & Storage Company.

Q. Why did you pay them that money, Mr. Green? A. Because the stone belonging to the Government was remaining here after the annulment of the contract of Graham in his yards, and it was necessary to get it over to Washington where we could cut it on his account and complete the work required with it, which he had abandoned, under his contract, and the necessary expense of doing that was practically, mainly, the re-freighting or hauling of the stone from Baltimore to Washington, and landing it at the Museum building.

Q. I hand you voucher No. 1,397, dated May 16, 1908, pay roll. A. This voucher is No. 1,397, a pay roll, in two sheets. The total is $459.36. It was paid by me for work in the first half of May, 1908, on account of Mr. Graham's contract. It was a pay roll of riggers, laborers, carpenters, engineer, draughtsman, tool dresser, blacksmith.

Q. Was the work performed on contract No. 25? A. It was performed on contract No. 25.

Q. I hand you voucher No. 1,399, dated May 21, 1908, in favor of Thomas W. Smith, for $306.64? A. This voucher No. 1,399, as read by the attorney, is in favor of Thomas W. Smith, made up April 27, 1908, and is:

"For furnishing the following Timber, in accordance with circular letter of April 16, 1908, competitive proposal of April 21, in response thereto, and order No. 337 herewith:

400 linear feet	4 x 6	}	
400 " "	8 x 10	}	
400 " "	10 x 12	}	$306.64"
400 " "	12 x 12	}	

This was paid to Mr. Smith on his certificate that the account was correct and just, and so forth, and my own certificate as shown by the signature on the voucher. It was paid in the usual way.

(218) Q. Please read the circular letter attached. A. As was done in connection with the cotton cloth in the preceding voucher which I read, a circular letter was sent out to five of the lumber dealers in Washington for proposals. The names of those to whom the circular letter was sent are on here: They are as follows: Thomas W. Smith, Thomas J. Shryock, W. T. Galligher & Brother, Church & Stephenson, and the George A. Fuller Company. The circular reads this way:

"Circular

Blocking

BUILDING FOR NATIONAL MUSEUM.

Office of Superintendent of Construction,
Library of Congress,

Washington, D. C., April 16, 1908.

"You are invited to write to the undersigned by Tuesday next, the 21st instant, the price for which you would furnish and deliver at the new building for the National Museum, in this city, the following material for blocking, to be used in connection with cutting stone, namely:

400 lineal feet each of sizes:

4″ x 6″	
8″ x 10″	10″ x 12″
	12″ x 12″

Each size is to be in lengths of 2 feet or multiples thereof, excepting that 10″ x 12″ and 12″ x 12″, should have at least 150 lineal feet at least 6′ or 8′ long.

Any kind of pine from white to yellow, or any other wood that is about equally light in weight and tough, will answer, but all the blocking must be of sound durable wood suitable for such work and reasonably free from wane.

Second-hand blocking, provided it is in good order and not too much worn, will do.

It may be delivered in as long pieces as may be, to make up the quantities of the respective sizes required and to be sawed up by the Government.

The blocking will be needed as soon as it can be delivered.

Please state how soon you would deliver the blocking if awarded the order. If at least ½ of it could be delivered in (219) materially less time, please so state.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Does that call for second hand material? A. Yes, it says here, "second-hand blocking, provided it is in good order and not much worn, will do."

Q. Why did you ask for second-hand blocking? A. Because I could get it cheaper. Second-hand blocking for such

a purpose, provided it is in reasonable condition, not absolutely spoiled, can be obtained at a considerably less price than new material, new lumber, or new timber, and that was economy, to get it as cheaply as we could, provided it would serve the purpose. So that description was put in the circular.

Q. What is the purpose of blocking? A. The purpose of blocking is to move the stone, it is for laying the stone upon and getting at it for dressing, and the usual uses in granite stone yards. It has to be heavy and stong to take the weight and stand the rough usage that is natural in the handling of rough blocks of granite of great weight.

Q. Do you know of your own personal knowledge that this was used in the Graham contract A. I do.

Q. I hand you voucher No. 1,401, dated May 22, 1908; check in favor of Lamb & Tilden, $2.50? A. This voucher, No. 1,401, was made up April 14, 1908, to the amount of $2.50, for two air-cushion rubber stamps, one six lines and one four lines, and for two stamp pads and one 4 *libe* air-cushion rubber stamp. This was for the purpose of the purchase of certain rubber stamps needed in the keeping of the accounts on the Graham contract.

Q. Do you know of your own personal knowledge that those rubber stamps were furnished? A. I do.

Q. I hand you voucher No. 1,406, dated May 22, 1908, in favor of the National Electrical Supply Company, for (220) $6.93? A. This voucher, No. 1,406, I paid to the National Electrical Supply Company of Washington, D. C. It was made up May 8, 1908, for eectrical single break switch, link fuses and 120 feet of No. 6 strand rubber covered wire, the total being $6.93. It was paid to the National Electrical Supply Company by myself, and certified to in the usual way as an account that was correct and just, and was paid by check in the usual way by myself. The material was required for some electrical lighting in the building, required for the convenience, necessary to the convenience, of the stone cutters and the workmen on this contract of Mr. Graham.

Q. Do you know of your own knowledge that that stone was furnished? A. Yes, sir.

Q. I hand you voucher No. 1,409, dated May 22, 1908, in favor of the Adams Express Company, for 10 cents.

Mr. GAITHER: Personal knowledge.

Mr. HILL: I have not shown it to the witness yet.

The COURT: Let that item go.

Mr. GAITHER: Does he know about that of his personal knowledge?

Mr. HILL: You will omit this, will you?

The WITNESS: Voucher No. 1,409, paid by myself, was certified to by the Adams Express Company over their own signature, as before, as before, for express freight on public service, as follows:

"one package of blue prints (full size drawings, south pavilion granite, returned by Wm. Pirie, inspector) from Baltimore, Md. to Washington, D. C., 26 lbs., 40 cents."

That was for bringing back those blue prints: necessary service on the contract of Mr. Graham, at the new Museum building, needed there in continuance of the work under this contract.

By Mr. HILL:

Q. There appears on this subvoucher received from Express Company these words:

"The articles or services herein called for are for use in completing the contract of Frank F. Graham, dated Oct. 23, (221) 1906, for granite work for the south pavilion."

That is signed, William C. Looker, for Superintendent of Construction." Who is William C. Looker? A. Mr. William C. Looker was a clerk employed on the construction at the new Museum building in the local office of construction.

Q. Do you know personally that those plans came from Baltimore to Washington—those blue prints? A. I know that they were in Baltimore, and I know that they were in Washington after that. I could not say how they came. I did not accompany them over. I do not know how they got them there, except from the statement by the Express Company.

Q. I hand you voucher No. 1,413, dated May 23, 1908, in favor of George F. Muth & Company for $1.63. Is that right? A. This was a voucher, No. 1,413, that I paid to George F. Muth & Company in Washington. They are paint dealers, there, and also dealers in artists and architect's utensils and materials, and this was paid to them for 23 yards of detail paper and 50 thumb tacks, in all, $1.63. These articles were required on the work in the draughtsmen's room on the Graham contract at the Museum Building.

Q. I hand you voucher No. 1,419, dated June 2, 1908.

Mr. GAITHER: Do I understand that where you do not ask him about his personal knowledge, he has none?

Mr. Hill: Not always. If you want us to, we will ask him, and then we can see exactly what you want us to prove.

Q. Have you any personal knowledge of the purchase and the need for the purchase of these thumb tacks and this paper? A. Yes, sir. I know that they were necessary.

Q. Were these articles purchased A. I know they were necessary for that work, and I saw the paper and the thumb tacks in the draughting room after the purchase was supposed to have been made. That is all I know about it.

Q. I hand you voucher No. 1,419 dated June 2, 1908, for $3,488.39? A. This was a pay roll, designated voucher (222) No. 1,419, amounting to $3,488.39, paid for the services of the employees on account of Mr. Graham's contract at the Museum building for the latter half of the month of May, 1908. It bears my signature and certification that it is correct.

Q. Have you any personal knowledge that that money was paid, Mr. Green?

Mr. Gaither: That is not the question; it is not whether he had personal knowledge that the money was paid or not, it is his personal knowledge whether the work was done.

Q. I will ask you the question whether the money was paid and the work was done?

The Court: I think the form of the question should be whether the money was paid.

Mr. Hill: We have his signature on the voucher.

Mr. Gaither: He does not swear that he paid it.

The Witness: I signed the check for it.

The Court: Then you paid the money.

The Witness: And I paid it as nearly personally as it was practicable to do such a piece of work. The signatures are on the roll as usual in the columns of signatures, opposite the name of each individual, who is supposed to be paid the amount set opposite his name for his services on this work.

The Court: What was the character of the services?

The Witness: The character of the services is stated in the rolls. These people were laborers and mechanics and other employees in the shop, and foremen, and draughtsman—that was one of them—carpenters, stonecutters necessarily employed in carrying on this work of Mr. Graham's contract at

the Museum Building. That pay roll is in five sheets apparently.

Q. I hand you voucher No. 1,421, dated June 2, 1908, in favor of John Carlson, for $450. There appear to be in this voucher bids, etc. It is not necessary to read all of them. We offer them all in evidence. Please identify these papers and read the voucher itself. A. The voucher here is No. 1,421, paying John Carlson of Baltimore for boxing granite. (223) The voucher reads as follows:

"For boxing of cut Bethel granite and the moving of same, and of all other Bethel dimension granite belonging to the United States, to the cars and loading the same upon cars at the yard of Frank F. Graham, Baltimore, Md., in accordance with competitive proposal of May 13, 1908, and order No. 368 of May 14, herewith—$450."

That is certified by John Carlson as correct, and certified by myself, over my signature. The object is apparent in the statement of the account in the voucher, and the expenditure was incurred by first issuing a circular as was done in the previous instances mentioned here, asking for proposals from a number of people here in Baltimore, six of them, asking for bids, as follows:

Circular:

Loading stone on cars in Baltimore.

BUILDING FOR NATIONAL MUSEUM.

Office of Superintendent of Construction,
Library of Congress,

Washington, D. C., April 27, 1908.

Gentlemen:

The Bethel white granite, some of it more or less cut and dressed and the larger portion in the rough, now lying in the granite yard of Frank F. Graham, at Calhoun street & B. & O. R. R., is to be immediately loaded on cars and shipped to Washington by the United States.

You are requested to examine the stone and the situation, and let me know, in writing, within the next two days for what gross price you will load the cars with this stone for shipment, with the understanding that the railroad company will do simply the hoisting on board the cars with their wrecking crane and apparatus.

The cut stone must be carefully and properly boxed before handling, and all the stone must be properly blocked and se-

cured upon the cars according to the requirements of the rail-
(224) road company and the law.

The contractor receiving the order would of course be responsible for any damage to the stone resulting in the handling.

Payment will be made upon the entire completion of the shipment.

The matter had already been explained to you recently by Mr. Pirie the agent of this office.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

I received bids.

Q. Will you read the abstract of proposal? A. The abstract of proposal is here. Before the bids were all in I received bids from two or three more parties than those to whom the circular was originally sent as inscribed on the circular itself. The abstract of the bids received in response to this circular is as follows:

Memorandum

Loading stone on cars.

NEW BUILDING FOR NATIONAL MUSEUM.

Office, Superintendent of Construction,
Library of Congress, Washington, D. C.

May 18th, 1908.

Gentlemen:

Abstract of proposals received in response to circular letter of April 27, 1908, requesting bids for Loading Stone on Cars at Baltimore:

John Carlson,	$ 450.00
Central Transfer Co.,	745.00
William Addie,	875.00
The Baltimore Transfer Co.,	1,135.00
Isaac H. Poddicord & Sons,	1,200.00
Green's Transfer & Express,	1,847.00
Briddell Transfer Co.,	1,965.00
Maryland Transfer Co.,	6,000.00
Independence Transfer Co.,	1,950.00

the Museum Building. That pay roll is in five sheets apparently.

Q. I hand you voucher No. 1,421, dated June 2, 1908, in favor of John Carlson, for $450. There appear to be in this voucher bids, etc. It is not necessary to read all of them. We offer them all in evidence. Please identify these papers and read the voucher itself. A. The voucher here is No. 1,421, paying John Carlson of Baltimore for boxing granite. (223) The voucher reads as follows:

"For boxing of cut Bethel granite and the moving of same, and of all other Bethel dimension granite belonging to the United States, to the cars and loading the same upon cars at the yard of Frank F. Graham, Baltimore, Md., in accordance with competitive proposal of May 13, 1908, and order No. 368 of May 14, herewith—$450."

That is certified by John Carlson as correct, and certified by myself, over my signature. The object is apparent in the statement of the account in the voucher, and the expenditure was incurred by first issuing a circular as was done in the previous instances mentioned here, asking for proposals from a number of people here in Baltimore, six of them, asking for bids, as follows:

Circular:

Loading stone
on cars in Baltimore.

BUILDING FOR NATIONAL MUSEUM.

Office of Superintendent of Construction,
Library of Congress,

Washington, D. C., April 27, 1908.

Gentlemen:

The Bethel white granite, some of it more or less cut and dressed and the larger portion in the rough, now lying in the granite yard of Frank F. Graham, at Calhoun street & B. & O. R. R., is to be immediately loaded on cars and shipped to Washington by the United States.

You are requested to examine the stone and the situation, and let me know, in writing, within the next two days for what gross price you will load the cars with this stone for shipment, with the understanding that the railroad company will do simply the hoisting on board the cars with their wrecking crane and apparatus.

The cut stone must be carefully and properly boxed before handling, and all the stone must be properly blocked and se-

cured upon the cars according to the requirements of the rail-
(221) road company and the law.

The contractor receiving the order would of course be responsible for any damage to the stone resulting in the handling.

Payment will be made upon the entire completion of the shipment.

The matter had already been explained to you recently by Mr. Pirie the agent of this office.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

I received bids.

Q. Will you read the abstract of proposal? A. The abstract of proposal is here. Before the bids were all in I received bids from two or three more parties than those to whom the circular was originally sent as inscribed on the circular itself. The abstract of the bids received in response to this circular is as follows:

Memorandum

Loading stone on cars.

NEW BUILDING FOR NATIONAL MUSEUM.

Office. Superintendent of Construction,
Library of Congress, Washington, D. C.

May 18th, 1908.

Gentlemen:

Abstract of proposals received in response to circular letter of April 27, 1908, requesting bids for Loading Stone on Cars at Baltimore:

John Carlson,	$ 450.00
Central Transfer Co.,	745.00
William Addie,	875.00
The Baltimore Transfer Co.,	1,135.00
Isaac H. Poddicord & Sons,	1,200.00
Green's Transfer & Express,	1,847.00
Briddell Transfer Co.,	1,965.00
Maryland Transfer Co.,	6,000.00
Independence Transfer Co.,	1,950.00

(225) The order has been given to John Carlson, the lowest bidder.

Respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. What was the highest bid? A. $6,000.
Q. And the lowest bid was what? A. $450.
Q. You gave the contract to whom? A. The lowest bidder.

Q. Do you know that that work was done? A. I know that that work was done.

Q. I hand you voucher No. 1,423, of June 2, 1908, in favor of William Pirie, for $87.50. A. This voucher No. 1,423 is on account of William Pirie, in amount $87.50. The payment was for services rendered as master stone cutter for the south pavilion granite work from May 1, 1908, to May 15, 1908, inclusive, 15 days of the month at $175 per month, amounting to $87.50, certified by William Pirie as correct and just, and certified by myself as usual and paid by check to Mr. Pirie June 4, 1908.

Q. Please read that next paper to that. A. This paper is a receipt for this amount of money, signed by William Pirie, which is as follows:

LIBRARY OF CONGRESS,

Building for National Museum.

Washington, D. C., June 4, 1908.

Received of Bernard R. Green, Superintendent of Construction, in person or by his duputy, and in cash, the sum of eighty-seven dollars and fifty cents in full payment of Voucher No. 1,423, account of building for National Museum.

(Not to be signed in duplicate.)

WILLIAM PIRIE."

that is a receipt he gave for this money.

(226) Q. Do you know from your own personal knowledge whether or not those services were rendered? A. I do know they were.

Q. What were the services? A. The services were in charge of the management of the cutting of the stone or ac-

count of Mr. Graham's contract at the new Museum Building; contract No. 25, which was annulled.

Q. I hand you Voucher No. 1,426, of June 3, 1908, in favor of Samuel T. Maxwell, for $2.50. A. This is for services rendered as watchman at the granite yard of Frank F. Graham in Baltimore, Md., on May 12th, 1908; one day at $2.50 per day, $2.50. I paid that amount to him by check.

Q. Why did you pay him that? A. That was for necessary services as watchman at the Graham yard to see that the material there belonging to the United States was kept secure and safe.

Q. I hand you Voucher No. 1,427, of June 3, 1908, in favor of Herman Hilbert, for $15. A. This is a similar voucher for similar services by Hermann Hilbert. It reads:

"For services as watchman at the granite yard of Frank F. Graham in Baltimore, Md., from May 16, 1908, to May 21, 1908, inclusive, six days at $2.50 per day, $15."

I paid that amount to him by check, the voucher bears his signature certifying the correctness of the account.

Q. I hand you voucher No. 1,428, of June 3, 1908, in favor of Robert L. Mathaney, for $22.50. A. This voucher No. 1,428 is, as read by the attorney, in favor of Robert L. Mathaney of Baltimore, Md., for services as watchman at the granite yard of Frank F. Graham, in Baltimore, Md., for nine days, from May 13 to May 21, 1908, at $2.50 per day, $22.50, which I paid by check to Mr. Mathaney in the usual way.

(227) Q. Do you know from your own personal knowledge that that man rendered those services? A. No.

Q. Who does know? A. Mr. Pirie.

Q. Anybody else? A. I think—I am not sure, but I have no doubt—that other people know that the man was there performing the services. I did not come over to Baltimore to see him.

Q. I hand you voucher No. 1,431, of June 11, 1908, in favor of the Washington Railway and Electric Company, for $5. A. This voucher, No. 1,431, is in favor of the Washington Railway and Electric Company, which operates certain of the street railways in the City of Washington. This is for 120 car tickets at 4½ cents each. You buy street car tickets in Washington as all of you know at the rate of six tickets for a quarter of a dollar. The amount of this is $5 at that rate, 120 car tickets at 4½ cents each, $5, which I paid to the Washington Railway & Electric Company in the usual way by check. Those tickets were for the use of the work on Mr. Graham's contract at the new Museum Building, in transporting ac-

counts and doing messenger work necessary in connection with that work, between that work and the Library of Congress, my office, and other miscellaneous similar messenger service, all on account of and needed for the Graham contract.

Q. Did you use any of those car tickets yourself? A. I did not.

Q. When you went down to the works, who paid your car fare? A. I paid it myself. I had nobody to do it for me.

Q. Was it charged to the Graham contract? A. No, sir. Sometimes I went a foot. I didn't have to pay for that.

Q. I hand you voucher No. 1,448 of June 15, 1908, it being payroll for June 8th, first half, $6,294.92. A. This (228) is voucher No. 1,448. It is apparently in seven sheets; paid in June, for the first half of June, on account of Mr. Graham's contract, for services of employees on work for the first half of the month of June, 1908. The total amount of the roll is $6,294.92. It is like all the previous rolls that have been presented in this case for this purpose. It is a roll of workmen and employees of all kinds on this account, for that period of time, and in the signature column, it bears the signatures of the respective employees for the receipt of the respective amounts due them and paid them. It is certified by myself as usual.

Q. Are there any receipts on these vouchers? A. Each one has signed his name in receipt, with his own hand, in the receipt column opposite his respective name, as the heading of the roll reads.

Q. That is a payroll for cutting granite, mostly? A. Yes.

Q. From your own observation, was there enough granite cut at this time to cover the payments which had been made up to this time?

The COURT: What is the meaning of that question?

Q. During the period covered by this voucher, do you know from your own knowledge whether the work was done on the stone to cover the payments in that voucher?

The WITNESS: I know that the stone cutting was going on through the whole period, the stone cutters were at work there, and all the force, as near as I could judge by observation, were engaged constantly on the work through that period of time, and the quantity of the stone cut was apparently—I saw it on the ground—equivalent to the amount of time that had been put upon it by this force.

Mr. GAITHER: Do you know how much stone was cut in the month of July? A. I do not know.

(229) Mr. Hill: You can ask that question. I did not ask it.

Mr. Gaither: It seems to me we have a right to test the witness here, now.

The Court: He says that from his observation, the amount of stone he saw on the premises there bore some relation to the amount of money.

Q. (Mr. Hill) Voucher No. 1,119, June 18, 1908, in favor of the Baltimore & Ohio Railroad Company, $104.00? A. This voucher No. 1,119, in favor of the Baltimore & Ohio Railroad Company, account made up to June 1st, 1908, for (230) car service on rough granite at the freight station, Washington, D. C., as follows—and then there are a lot of items, two or three columns of them, little items—let's see, this may be demurrage items—they are demurrage items in amounts of six dollars, seven dollars, or eight dollars each, some ten dollars, one here for twelve dollars, fourteen dollars, four dollars and eight dollars, etc., totalling up to $104.00. Let's see, what do you call this? There is a little separate bill from the railroad company attached to the voucher. These are charges upon the several carloads in individual amounts that I have indicated for demurrage, as I understand it.

Q. Why did you pay that? A. I paid that because the cars—if it is for demurrage and there is no reason to suppose it is for anything else—we had several carloads of granite arriving on the way to Mr. Graham's yard at the time the contract was abandoned, and some had already arrived but had not been unloaded because the access to the yard seemed to be blocked, or impractical for the time, and these papers were necessary in order to get possession of the granite because the Railroad Company would not deliver it, or release it, until those charges on it, the ordinary charges on it by the railroad company, were paid. That is the reason I paid the bill to the Railroad Company.

The Court: This was for demurrage on account of detention of cars here in Baltimore? A. Yes, your Honor.

Q. At Mr. Graham's yard? A. Somewhere in Baltimore and somewhere on the way to Baltimore, as I understand it, at the time the contract work was stopped here and when they arrived here they were, more or less, immediately reconsigned to my address in Washington, and others already here at the time the contract work was stopped were waiting to be unloaded and it took some days, I believe, to reconsign to me in Washington and there were certain delays upon those cars for the time they remained unloaded, which were chargeable against the contractor here, or the Government, as the case

might have been, before the material could be released. This is a voucher to the Railroad Company that pays for a great many of those cars that were in that condition at that time. (231) The dates show what period they were detained and show, therefore, what number of days the demurrage was charged. May 7th is the first item. A certain car designated here was charged for six days; another car six days; on May 8th another car at seven days, etc., and another on the 11th for nine days, on the 20th for eleven days—I mean the 13th, and so on down. The rate appears to be $1.00 per day, the number of dollars corresponds with the number of days.

Q. Voucher 1,454, June 18th, 1908, in favor of the Baltimore & Ohio Railroad Company, $3,034.53. We do not want to consume any more time than necessary and I will ask the witness if the remarks he made in reference to the other voucher apply to this, or state what that is, if it isn't for demurrage? A. This voucher, No. 1,454, was paid to the Baltimore & Ohio Railroad Company for freight on rough granite for South Pavilion, as follows: From Bethel, Vt., to Washington, D. C. Those were amounts paid to the Railroad Company for freighting the granite from the quarry in Vermont direct to Washington. That is the granite, rough granite, furnished for this purpose under the Graham contract for continuing the work on the Graham contract at the Museum Building in Washington.

There are other charges here for freighting the granite from Baltimore to Washington—that is, the car loads that had arrived here instead of going direct to Washington during the time that the change was being made in the freight route, the change being made from a Baltimore delivery to a direct Washington delivery. There are many items here paid and the total amount of $3,034.53 to the Baltimore & Ohio Railroad Company on the Graham account.

Q. This was for straight freight? A. Yes, sir; all freight.

Q. Voucher 1,455, June 30th, 1908, in favor of W. D. Briscoe, sixty dollars? A. This is an account, Voucher No. 1,455, paid by me to W. D. Briscoe, of Washington, for furnishing one derrick spider and gudgeon with links, etc., and one (232) pinted and socket for boom derrick, in accordance with proposal of June 3rd, 1908, and order No. 100 herewith, $48.00. For six Journal boxes with three pins complete, in accordance with verbal proposal by telephone of June 12th, 1908, and order 422 herewith, $12.00. Total $60.00.

This apparatus was required for the conduct of the Graham contract at the Museum Building in Washington for the derrick fittings necessary for the handling of the stone.

Q. Do you know whether or not those derricks were delivered? A. They were not derricks. They were parts for

a derrick. A derrick spider goes to the top of a derrick to receive the guys and hold them in position, etc.

Q. Were they delivered? A. They were delivered; I know they were.

Q. Voucher 1,160, June 30th, 1908, in favor of John H. Houser, for $18.75? A. I paid this voucher No. 1,460 to John H. Houser for the use of one two horse team for hauling stone from shed to building, amounting altogether to $18.75. This was for the purpose of the Graham contract work.

Q. Do you know whether that work was done? A. Yes.

Q. Voucher 1,163, June 30th, 1908, in favor of W. A. H. Church, $549? A. I paid this voucher to W. A. H. Church in Washington, for six pieces of white pine selects, dressed four sides, and some three bars of glazed sash, and two white pine, dressed altogether costing $549.

That was furnished by Mr. Church who was a lumber dealer in Washington for the use of the Graham contract at the Museum Building in Washington. It was used mainly for the purpose of putting up a small shelter as headquarters for the foreman and the draftsman making the diagrams for the purpose of cutting the stone.

Q. Did you pay that money after asking for bids on a competitive basis? A. I did. The purchaser of the lumber, as was the general practice in my office was—the bids were re-
(233) ceived from four or five different dealers, five of them being asked for proposals. The order was given to the lowest bidder at $549 for the lot, the other bids being by Eisinger Brothers at $611.00, Thomas W. Smith at $619.82 and W. D. Gallaher & Bro. $654.23. The fifth party declined to bid. The order was given to the party who bid the lowest price, which was $549.00.

Q. Have you any personal knowledge of whether or not that stuff was delivered? A. I know it was.

Q. Voucher No. 1,161, June 30th, 1908, in favor of C. H. Beavers, $19.20? A. I paid this voucher No. 1,161 to C. H. Beavers in Washington for furnishing sixteen iron bound water barrels in accordance with a telephone inquiry to different dealers to find the lowest price at which they could be purchased. They were bought at $1.50 each, the sixteen amounting to $19.20.

Q. For what were they used? A. They were used in connection with the drinking water for the cutters and the workmen, but particularly for the blacksmith shop for the sharpening of tools—used for the purpose of cooling the tools off?

Q. Can you tell what the highest bid was on those barrels per barrel? A. The highest bid was $1.25 each and the lowest $1.20 each.

Q. And you bought them at what price? A. There is a note pinned to the voucher which is an abstract of the proposals received in response to telephone inquiry; two parties C. H. Beavers and John M. Beavers, one bid $1.20 each and the other $1.25. The order was given to the lowest bidder at $1.20.

Q. Do you know whether or not those barrels were delivered? A. I do not, except I saw such barrels there on the works in use and therefore I have no doubt they were delivered. They were paid for and were there. We did not have them there before that.

Q. Voucher No. 1,465, June 26th, 1908, in favor of Trow and Holden, $1,075.00: A. I paid this voucher No. 1,465, amounting to $1,075.00 to Trow & Holden of Barre, (231) Vermont, for furnishing the following tools, all to be made of Black diamond tool steel, sharpened ready for use, in accordance with circular letter of April 17th, 1908, from my office and the competitive proposal of April 20, 1908, in response thereto. There are a number of bull sets, stone points, chisels, stone points, pitching tools, chippers, plug drills, stone axes, and sets of plugs and feathers. These are the tools used necessary for the cutting of granite. That source of supply of tools at Barre, Vermont, is a celebrated and excellent one for the furnishing of proper tools for such a purpose. It is well known to the trade all over the country. I made this purchase of them.

Q. Did you buy them after competition? A. Yes.

Q. Please state the highest bid? A. We had competition on it and there was a circular issued on April 7th, 1908, for bids on these tools. We sent them to six different parties: F. Phillips & Son, Greenmount avenue, Baltimore, H. H. Harvey, Oliver St., Boston, Mass., Wilcox & Donohue, Westerly, R. I. That was a celebrated granite tool manufacturing centre. Circulars were also sent to Nutting & Hayden, Concord, N. H., also a granite region, Trow & Holden, Barre, Vt., and the Harrison Supply Co., of Boston. There was a schedule of the tools wanted, the number and sizes and kinds in a circular sent to those different parties which reads as follows: "Please submit to this office in writing, in duplicate, by Thursday next, the 23rd instant, the gross price for which you would furnish and deliver, for the new building for the National Museum building, in this City, the following granite cutting tools, sharpened ready for use." Then is a schedule of the tools required. "All the above to be made of Black diamond tool steel, and all to be quarter octagon except the axes. All the above will be needed as soon as they can be delivered. Please state how soon you would make shipment after receipt of or-

der. Tools all to be first class and to the entire satisfaction of the undersigned. Yours respectfully, Bernard R. Green." The order on the regular form was decided upon and was sent to Trow and Holden and the order itself is here.

Q. What did you pay for those tools? A. This sum of $1,075.00.

(235) Q. What was the highest bid for them? A. The highest bid was $1,375.69.

Q. Did you buy at the lowest bid? A. I did. The lowest bid was $1,075 and the other bids were higher, ranging from $1,075 to the highest bid, $1,375.69, which I have mentioned.

Q. Were they purchased for use on the Graham contract? A. They were.

Q. Do you know whether or not they were delivered? A. I know they were delivered because they were used thereafterwards. We had no other tools to do the work with and we had the tools to do it with after that purchase was made and I therefore say I know they were delivered. It may be they fell by the wayside and that somebody else furnished what we have got there but we did not pay any more than that for them.

Q. Voucher No. 1,168, June 30th, 1908, in favor of Lansburgh & Bro., $10.50? A. I paid this voucher to Lansburgh & Bro. in Washington, D. C., No. 1,168, $10.50, for furnishing fifty yards, No. 1 8/4 Brown sheeting, at $.21 per yard, in accordance with order No. 418 herewith, $10.50. This purchase was probably made direct. I do not know that there was any competition on that particular purchase. The order is "Messrs. Lansburgh & Bro.: please furnish for this building and deliver immediately at 10th & B. streets, N. W., 50 yards No. 1 8/4 Brown sheeting, at 21¢ per yard, being the same quality as that furnished under order No. 324 of April 22nd, 1908, based on your proposal of April 18th, and at the same price.

Q. Is the previous proposal the one you have already testified to? A. Yes; that was obtained on competitive bids.

Q. What was that to be used for? A. For a similar purpose as the other cloth that was purchased under the previous mentioned voucher. We had a larger force of men by that time, I am quite sure, and therefore we needed a little more of the (236) cloth and bought it in the same way as the other.

Q. Do you know whether or not it was received and used? A. I do; I know the cloth was used.

Q. Voucher No. 1,171, June 30th, 1908, in favor of Eisinger Bros., $51.78. A. I paid this voucher to the amount of $51.78, No. 1,171, to Eisinger Bros. in Washington, for furnishing the following Virginia pine, in accordance with cir-

cular letter of May 11th, 1908, competitive proposal of May 12th, in response thereto and order 373 herewith. Twenty pieces of lumber, 2" x 10" x 16', 20 short pieces and the number of pieces totaled amounting in all to $51.78. The bids were received in response to a circular in my office signed by myself, addressed to four different lumber people in Washington.

Q. Please state the highest and the lowest bid received, and what bid was accepted by you? A. Two of those parties responded with bids: Eisinger Bros. $51.78, W. T. Gallaher & Bro., $53.79. The order was issued to Eisinger Bros. and filled by them and the voucher paid as read.

Q. What was that ordered for? A. The lumber?

Q. Yes. A. It was for use for the shade and shelters they were putting up to protect the stone cutters in their work, covering the blacksmith forges, etc. It was a small lot because we did not purchase very much material for that purpose.

Q. Was it delivered? A. It was.

Q. Voucher 1,476, paid June 30th, 1908, in favor of J. B. Kendall, $159.72? A. This voucher No. 1,476 I paid to J. B. Kendall in the amount of $159.72. The payment was for six $\frac{3}{4}$ x 11$\frac{1}{2}$" water gauge glasses at 10c each and bar, 1$\frac{1}{2}$" round cold rolled shafting, 63 lbs. at $3.500 per hundred, and for other items brought forward from the previous page, amounting in all to $159.72.

(257) Q. What were they used for? A. The water guaged glasses were for the steam boiler employed in the necessary machinery for doing the work. The grindstones and other tools needed them, and it was used for the stone cutting work under Mr. Graham's contract. Those water guage glasses were furnished and so was the piece of cold rolled shafting and they were used in the work.

Q. Voucher No. 1,479, June 30th, 1908, George F. Muth & Co., $18.27? A. I paid this voucher No. 1,479 to George F. Muth & Co., of Washington, for a number of items of paint materials, in which they were dealers, some light blue paint, half gallon, half gallon of turpentine, four marking pots, and a bottle of red writing ink, etc., a box of small rubber bands, paper fasteners and such slight things, and a roll of simplex paper for the use of the draftsmen in making the diagrams, stone diagrams necessary in the office there, and for marking the stone with the proper numbers, as has to be done in red or black paint after the stones are finished in order to designate the stones and connect them up with the drawings so that they can be kept track of in order to go in their proper places in the building.

Q. On what contract was this material used? A. On contract No. 25; Mr. Graham's abandoned contract.

Q. Do you know whether or not the material was received? A. I know that it was received because it was being used there for that purpose and we had no other source of procuring that necessary material.

Q. Voucher No. 1,480, June 30th, 1908, in favor of the Standard Chain Company $44.04. A. I paid this voucher, No. 1,480 to the Standard Chain Company of Pittsburg, Pa. It was for furnishing the following H. B. Dredge chains with hooks and rings, in accordance with inquiry of April 18th, 1908, proposal of April 24th, in response thereto, and order No. 336 herewith: One piece 3" x 10' H. B. Dredge chain, 162 lbs., 2 slip hooks, 19 lbs., 2 rings 10 lbs., 191 lbs. at 7½¢ $14.33 and another piece of dredge chain 3" x 10', 352 lbs. 2 slip hooks 17 lbs., 2 rings 25 lbs., 424 lbs. at 7c. $29.68, the total amount being $44.04.

Q. Can you tell us whether or not that material was received? A. The material was received because it was used (238) out on the work for slinging and handling the stones?

Q. Did you see any of that on the work? A. I did.

Q. Voucher No. 1,481, June 30th, 1908, in favor of the Maine Electric Co., $95.50? A. I paid this account to the Maine Electric Co., Portland, Md., Voucher 1,481, in the amount of $95.50 for furnishing one second-hand 10 H. P. 220 Volt Direct Current Motor, with new starting box complete, in accordance with circular letter of April 24th, 1908, competitive proposal of April 27th in response thereto and order 339 herewith. The purpose of this motor was for the turning of the grindstones necessary for the sharpening of the tools by the stone cutters on account of contract No. 25, Mr. Graham's abandoned contract.

Q. Why did you buy a second hand one? A. Because I could get it cheaper than I could if I bought a new one.

Q. Do you know whether or not that was delivered and used on the works? A. I know it was.

Q. How do you know it was? A. I saw it there in operation.

Q. Was or was not this purchase made after competitive bidding? A. It was.

Q. If so, state the highest bid and the lowest bid and what you paid for it? A. I sent out a letter of the specification and an invitation for proposals for this motor on April 24th, 1908, and I sent it to four different electrical concerns, one in Portland, Me., one in New York, and two in Washington. It was the usual form of circular describing what was wanted, and in response to that I received the following proposals, Maine Electric Co., $99.50, for a 10 H. P. motor, National Electrical Supply Company $125 for new 6 H. P. motor; there was an

offer of $15 per month for rental, Lord Electric Company $155.00 for 7½ H. P. Motor, and $140 for 7½ H. P. slightly different, $160 for 7½ H. P. Machine, $160 for an 8 H. P. (259) machine and $125 for a 5 H. P. Machine. The requirements in the specification was that the machine should be at least a 6 H. P. machine. There was no harm in having a higher power but it had to be at least six. Those offers for such machines they had, second-hand or any other sort of thing would answer the purpose, but they are all higher than the price offered by the Maine Electric Company at $97.50. Believing that machine would answer the purpose, I ordered it and bought it from the Maine Electric Company.

Q. Voucher No. 1,482, June 30th, 1908, in favor of the Harrison Supply Company $85.20? A. This voucher in favor of the Harrison Supply Company, of Boston, Mass., No. 1,482, I paid to the party for furnishing four grind-stones five feet five inches—that meant in diameter—in accordance with letter of inquiry of April 22nd, 1908, proposal of April 24th, in response thereto, amounting to the price of $85.25 and the purpose of these grind stones was the grinding of the tools for the cutting of the granite under the Graham contract.

Q. Do you know whether or not those grindstones were delivered? A. I do.

Q. How do you know? A. I saw them delivered and saw them set up in the building and saw them used until they were worn out on this contract of Mr. Graham's and for no other purpose.

Q. Voucher No. 1,485, June 30th, 1908, in favor of Smith, Whitcomb & Cook Co., $101.50? A. I paid this voucher No. 1,485 in the amount of $101.50 to Smith, Whitcomb & Cook Co., of Barre, Vt., for two iron grindstone frames, each to carry two stones of five feet in diameter by five inches thick in accordance with circular letter of April 24th, 1908, proposal of April 28th in response thereto, and order herewith amounting to $101.50. Similar proceeding as any other voucher that I read here—

Q. Do you know whether they were delivered? A. Yes, indeed; I know they were delivered and used on the Graham (240) contract.

Q. Voucher No. 1,486, June 30th, 1908, in favor of Central Transfer Company, $58? A. I paid this voucher No. 1,486 to the amount of $58 to the Central Transfer Company of Baltimore for transferring stone from the yard of Frank F. Graham, Baltimore, Md., to Mt. Clare station, B. & O. Railroad, and loading on cars as follows: One four horse team, two days at $12 per day, $24; one foreman two days at $4 per day—$8; three laborers 2 days at $3 per day—$18; one carpenter (crating stone), two days, two days at $2.50 per day—$5; lumber

used in crating $2.00; cutting one Lewis hole in the stone, $1, that was to handle the stone, amount $58. This was for the stone belonging to the Government moved from Mr. Graham's yard to the Museum building in Washington.

Q. Voucher 1,490, June 30th, 1908, pay roll for personal services up to June, 1908, $7,116.32? A. This is on pay roll on account of Mr. Graham's contract that I paid for the pay roll of the employees on this contract at the Museum building in Washington for the last half of the month of June, 1908, amounting to $7,116.32. It is a roll in which there are seven sheets containing the names and the amounts paid on account of that party for services on this contract by the various employees, laborers, mechanics, foreman, etc. The signatures upon it are by the several employees for the respective amounts of money which they received.

Q. Whose is that signature? A. That is my signature as Superintendent of Construction certifying to the correctness of the pay roll.

Q. For what character of services were those sums paid, if you know? A. For the services of laborers, riggers, carpenters, stone cutters, engineer, water boy and all the people employed on account of this contract in carrying it out at the building of the National Museum in Washington.

Q. Voucher No. 1,491, June 30th, 1908, in favor of the Baltimore & Ohio Railroad $115.00. A. I paid this voucher (211) on this account No. 1,491 to the Baltimore & Ohio Railroad Company in the amount of $115 for car service on rough granite at freight station, Washington, D. C., as follows—this means the demurrage of eleven to twelve days respectively on ten different cars amounting to $1.00 a day, a total amount of $115. This is a delay on other cars in the account presented a few minutes ago of freighting the granite from Baltimore to Washington.

Q. Voucher 1,492, June 30th, 1908, in favor of Baltimore & Ohio Railroad $675.17? A. This voucher No. 1,492, to which is attached the sub-vouchers for the different items, was paid by me to the Baltimore & Ohio Railroad Company for freight on rough granite for South Pavilion as follows: From Baltimore, Md., to Washington—there is a series of cars enumerated here—car loads—and in addition the two items of freight from Bethel, Vt., to Washington, for two car loads of granite on this Graham account, these two freight items amounting to $256.80 added to the other miscellaneous items that I have not read and detailed making a sum total of $675.17. That was for freight to Washington on the rough granite furnished for the Graham contract and its completion at the Museum building in Washington.

Q. Do you know whether or not that granite was delivered? A. I know it was.

Q. Voucher No. 1,493, July 10th, 1908, in favor of Merchants' Transfer & Storage Co. $1,129.10? A. This voucher No. 1,493 was paid by me to the Merchants' Transfer & Storage Co. in the amount of $1,129.10 for freight including a car service charge at Mt. Clair, Md., on rough granite belonging to United States originally shipped from Bethel, Vt., and consigned to Graham in Baltimore, Md., to be freighted, cut and delivered under his contract of October 23, 1906, which has been annulled and the cars reconsigned and reshipped from Baltimore, Md., to Washington, D. C., all as per the receipted freight bills of the Baltimore & Ohio Railroad herewith as follows: There are a number of items, ten of them altogether, in various sums in the neighborhood of $160, totally $1,129.10. This was granite used for the execution of the Graham contract.

(212) Q. Do you know whether or not that granite was received? A. I know it was received.

Q. Voucher 1,496, July 14, 1908, in favor of M. Buckley, $3.60? A. I paid this voucher to Mr. M. Buckley, $3.60 for services rendered as a stone cutter in June, 1908, on account of Mr. Graham's contract.

Q. Please read the attached receipt? A. The attached receipt shows that he was paid in cash instead of by check and this receipt reads as follows: "Received for cash payment, Library of Congress, Washington, D. C., July 14, 1908, received of Bernard R. Green, Superintendent of Library Building and grounds, in person or by his deputy, and in cash, the sum of $3.60 in full payment of voucher No. 1,496 on account of building for National Museum." That was charged against the Graham contract because the services were on account of that contract.

Q. Voucher No. 1,501, July 16th, 1908, payroll for personal services $7,724.54? A. This is a pay roll of seven sheets of the personal services of mechanics, laborers, and other employees at the Museum building for the first half of the month of July, 1908, amounting in all to $7,724.54. These are services similar to those in all the previous payrolls exhibited here and for the same purpose, certified by myself in the usual way.

Q. Whose signature is that? A. My own.

Q. And these other signatures? A. These other signatures are the signatures of the respective employees in receipt for the money for their pay for that month as stated on the payroll.

Q. Voucher No. 1,507, July 17th, 1908, in favor of F. W. Bolgiano & Co., $6.73? A. I paid this voucher No. 1,507

on account of the Graham contract in the amount of $6.73 to F. W. Bolgiano & Co., for 600 lbs. of rock salt and 148 lbs. of rock salt at 90c per hundred lbs., total amount of voucher $6.73. This rock salt is used in such work by the blacksmith in tempering the tools that he has to sharpen for the stonecutters.

(243) Q. Do you know whether or not that rock salt was delivered? A. I did not see it delivered but I know the tools were very well sharpened and the purposes of the rock salt which we did not have before that purchase was made anywhere about the place were fulfilled.

Q. Voucher No. 1,508, July 17, 1908, in favor of W. A. H. Church, $246.66. A. This voucher No. 1,508 to a lumber dealer, W. A. H. Church, in Washington, amounting to $246.66, for lumber purchased by a competitive proposal as in other cases of purchasing material for this Graham contract, and in this case, was for furnishing 250 pieces 1" x 10" rough Virginia pine, in accordance with verbal competitive proposals, by telephone May 21, 1908, $66.66 and for furnishing the following Virginia pine in accordance with verbal competitive proposal, by telephone, June 8, 1908, as stated in the voucher, amounting to $180, the whole amount being $246.66, and the purpose of it was for sheds and for the convenience of the workmen occupied in the cutting of the granite for the Graham contract. This account, attached to this voucher, to Church & Stephenson for the amount of $20 which is the lowest bid received of the four, received on this account, there being two bids at $22.50, and one at $21 and one at $20 from Church & Stephenson from whom the purchase was made.

Q. Do you know whether that was delivered or not? A. I know it was there on the ground as I saw it afterwards.

Q. Voucher 1,509, July 17, 1908, in favor of J. J. Crowley, $12.46? A. I paid this voucher No. 1,509 to J. J. Crowley for thirty pitching tools used and necessary in the process of the granite fittings on the Graham contract.

Q. What is a pitching tool? A. A pitching tool is a square blunt headed steel tool that is used for chopping off the granite, generally, to a line marked on the stone and is used generally near the corner of the stone. It is a tool with a head to it that you strike with a hammer, in order to split off the stone near the edge in process for roughing the stone down for the use of the finer tools afterwards—to finish the stone with.

(244) Q. Did you pay for this? A. I did.

Q. Do you know whether or not they were delivered? A. I know we had them there afterwards and that a good deal of pitching went on around there.

Q. Voucher No. 1,518, July 28th, 1908, in favor of Johnson Bros., $21.39? A. This voucher is in favor of Johnson

Bros., who were coal dealers in the City of Washington. I paid this voucher No. 1,518 amounting to $21.70 for run of mine coal, soft, used for the forges of the stone cutters, or for the blacksmith sharpening tools for the stonecutters. I paid that voucher in that account.

Q. Do you know whether or not it was delivered? A. I know it was.

Q. Voucher 1,523, April 28, 1908, in favor of Rudolph & West Company, $6.00? A. That voucher is in favor of Rudolph & West Company, hardware merchants in Washington, was paid to the amount of $6 for eight rolls two-ply tar roofing felt at 75c per rool. The purpose of that was for water proofing the sheds for the stone cutters, for water proofing the shelters that were put over their heads to keep the rain from trickling through when the showers come and therefore protecting the cutters in their work.

Q. Did you pay for that? A. I did.

Q. Was it delivered? A. Yes.

Q. Voucher No. 1,530, July 28, 1908, in favor of Thomas W. Smith, $171.45? A. Thomas W. Smith was a lumber dealer in Washington and I paid this voucher to him amounting to $171.45 No. 1,530, for two pieces of Oregon pine, the pieces were 14 x 14" square and 70' long, the price was $171.45. (215) Q. What were they used for? A. They were required for the derrick used for the putting together of a derrick for hoisting and handling the cut granite for the Graham contract at the building.

Q. Did you pay for it? A. I did.

Q. Was it delivered? A. It was delivered.

Q. How do you know it was delivered? A. I saw the timber there in use.

Q. Voucher No. 1,532, July 28, 1908, in favor of G. W. Forsberg, $14? A. I paid this voucher No. 1,532 to G. W. Forsberg of Washington, for making one set of Boom and bands, that was for the derrick, and one set of knee straps for bottom end of the boom in accordance with verbal competitive proposal of June 8th, amounting to $14. I paid that in the usual way. We received two bids for that piece of work, one by Forsberg $14 and one by W. D. Briscoe, who has another similar shop in Washington, amount to $20. We therefore ordered it from the lower bidder, who was known to be able to do the work properly?

Q. Was it received? A. Yes.

Q. Voucher No. 1,537, July 28th, 1908, Western Union Telegraph Company $1.11? A. This voucher No. 1,527 was paid to the Western Union Telegraph Company for three telegrams sent in April, 1908, two of them to Northfield, Vt., and one to Boston, amounting to $1.11. This was in regard to

business in connection with the parties of the carrying out of the Graham contract, the cut granite work.

Q. Voucher No. 1,540, July 28th, 1908, Western Union Telegraph Co. $1.08? A. I paid this voucher to the Western Union Telegraph Company amounting to $1.08 for five separate telegrams to Northfield, Vt., Barre, Vt., and Boston and also to Barre again.

(246) Q. Were those telegrams sent from your office? A. They were sent from my office.

Q. Who to. A. To Thompson-Starrett Company, Northfield. The original telegrams are here attached to the voucher. To Trow & Holden, Harrison Supply Company, and others being people who are dealers in steel tools and such things that we had to purchase for the Graham contract.

Q. Why were those telegrams sent? A. They were sent in connection with the purchase of these tools to save time and to clear up the business of purchasing these tools for the Graham contract.

Q. Voucher 1,542, July 28th, 1908, in favor of the American Ice Company $16.86? A. This voucher was paid by me to the American Ice Company for furnishing ice during the month of June and in accordance with circular letter asking for proposal in the usual way, and amounting to 5,620 lbs. of ice at 30c per 100 lbs., the usual price then paid in Washington, amounting to $16.86. This ice was necessary for the proper cooling and furnished to the stone cutters and mechanics during the hot season of the year, who were working on the Graham contract at the Museum Building for drinking water.

Q. Voucher No. 1,547, July 28th, 1908, in favor of O. L. Wolfsteiner & Co., Inc., $39.75? A. I paid this voucher to O. L. Wolfsteiner & Co., in Washington, D. C., for ten No. 24 Gauge Galvanized iron smokehoods in accordance with circular letter asking for proposal in the usual way, amounting to $39.75. They were needed for setting up the blacksmith's forges necessary to the sharpening of the tools for cutting the granite on the Graham contract.

Q. Was there competition on that? A. There was.

(247) Q. Give us the amount of the highest bid and the amount of the lowest bid? A. The highest bid was $60; the lowest was $39.75.

Q. Whose bid was the lowest? A. Wolfsteiner, according to the voucher.

Q. Do you know whether or not those things were delivered? A. I know they were there.

Q. How do you know it? A. Saw them in place on the blacksmith's forges.

Q. Voucher No. 1,550 in favor of Harrison Supply Company, check No. 1,789? A. The date of this payment was July 29, 1908, the number of the voucher is $1,550, amount $17.89, the creditor being the Harrison Supply Company of Boston. This voucher is for 100 lbs. of steel shot of size 14 for sawing granite, one sheet of zinc, and another sheet of zinc, total of the account $17.89.

Q. What was that shot used for? A. The steel shot was used for sawing the granite and is used in connection with the soft-plated steel saw and the shot is used in sawing granite in the cutting of the granite, the shot being drawn through the cut by the soft steel. Just as it is done in marble work, only in that work sand is used in the steel plate, drawn back and forth over the surface of the stone, which is fed by sand and water which enables you to cut the stone as if you were sawing a stick of wood with a buz saw, only not half so fast.

Q. Do you know whether or not this material was delivered? A. I know it was there and used for the purpose.

Q. How do you know it was there? A. I saw it used and I saw the work being done by it.

Q. Voucher No. 1,553, July 29, 1908, in favor of the Adams Express Company 75c? A. This voucher I paid to the Adams Express Company in July, 1908, for freighting an express freight charge on one duplicator from Pittsburg and one package of American white cement from Baltimore, (248) items respectively 35c and 30c, total 75c.

Q. Voucher 1,557, July 29, 1908, in favor of Lansburgh & Bro., $10.50? A. This is a voucher, the third one, in favor of Lansburgh & Bro. for some more of the 8-4 brown sheeting that was purchased under the previous accounts belonging to this case, $10.50. Fifty yards of sheeting purchased at the same price and same quality and all as the previous quantity and used for a similar purpose on the stone cutting job.

Q. Was it paid for? A. It was.

Q. Delivered? A. I have no doubt it was. We had all the cloth we needed.

Q. Voucher 1,564, July 29th, 1908, in favor of John H. Houser, $176.25? A. This is a similar account to a previous one in favor of the same party, Mr. John H. Houser. He was a teamster in Washington, for the use of teams for hauling stone during the month of June, amounting to $176.25. His team was employed 25½ days in this account and he hauled away besides that fifty loads of stone scrap, the chippings from the stone cutting, which was necessary to get out of the way to allow the work to go on.

Q. Do you know whether or not that service was rendered? A. I know it was.

Q. Voucher No. 1,566, July 29th, 1908, in favor of Alfred Mason, amount $3.50? A. I paid this voucher to Alfred Mason of Baltimore, for furnishing two linen blue prints of setting drawings and quarry diagram. These blue print drawings were copies of the plans necessary for the carrying on of the work under the Graham contract at the Museum Building.

Q. Voucher No. 1,572, July 30th, 1908, in favor of American White Cement Co., $1? A. This voucher is in favor of the American White Cement Company of Baltimore for one gallon of American white cement. That was material (219) used for the purpose of the cutting of the stone at the Museum building under the Graham contract.

Q. Was it paid for? A. Yes, sir.

Q. Voucher No. 1,576, July 30th, 1908, in favor of Thomas H. Dallett Company $120? A. I paid this account to Thomas H. Dallett Company of Philadelphia for twelve 3" Pneumatic Stone tools at $10 each. That made $120. They were tools required in the use of the cutting of the granite for the Graham account at the Museum Building. Pneumatic stone tools are tools operated by Pneumatic power, as it is understood, compressed air, for doing the finer work on the face of the stone.

Q. Were they used? A. Yes.

Q. On the Graham contract? A. Yes.

Q. (Mr. McLANAHAN.) Mr. Green, will you look at the voucher I now hand you and read to the jury the number of each voucher, the date of it, state what the voucher is for, and state whether or not you have any personal knowledge as to whether the work done or services called for in the voucher were performed?

(Handing voucher to witness.)

A. This voucher is No. 1,578, paid by me to E. F. Vermillion, for inspecting two vertical steam boilers and hoisting engines for the National Museum, $5 each, $10 total. I paid that and the work was done.

This voucher is No. 1,581 paid to James B. Lambie Company of Washington for a list of items of black diamond tool steel, soft steel, and Norway iron also a number of other articles; the first material mentioned coming to $129.62, and then a considerable quantity items here of steel for making the cutting tools for cutting the granite, also hardware supplies amounting to $698.75; also some 62 rolls of roofing felt, a couple of tuyers, irons used in forges, and some 12 sheets of galvanized (250) sheet iron to be used in connection with the work, amounting to $980.79 altogether. I paid that voucher and

although I did not see the material delivered myself I know that it was there and that it was used for that purpose.

Q. Was there any competition on this bid? A. There was on several items. The papers show that competition and are attached to the items.

Q. And you gave it to the lowest bidder, did you? A. I have no doubt that we did. We almost invariably did that. There are three or four classes of items here and there was competition on each one. For instance, the circular was sent out to different hardware merchants, five hardware merchants, of which Mr. James B. Lambie and Company was one, in the matter of tool steel, that is one of the items and Lambie was the lowest bidder at $130.01. The highest was $136.82. The first item in this voucher is at that rate, he being the lowest bidder on several classes of items. He is the lowest bidder in this case, and that is the amount in the voucher. James B. Lambie, in the matter of hardware supplies, price $698.75 and the highest bid was $744.50, he being the lowest bidder received the order, and that item for that class of work is in his voucher and is entered at that total amount, $698.75.

Mr. GAITHER: What was the total amount of the voucher? A. There are four classes of items. All the papers are attached and Lambie and Company was the lowest bidder on the several items. This next voucher is No. 1,583, paid to James B. Lambie Company, same company, for two dozen carriage bolts, some cable clamps, some sheets of galvanized iron, altogether five items amounting to $31.21 altogether. This material was all required for the work on this contract and was all delivered in the usual way. I did not see it myself delivered, but I know that the work went on and was done with it.

The next voucher here is No. 1,585, also paid to the paint dealers in Washington, George F. Muth & Company, five items of miscellaneous articles for making up marking paint, etc., amounting to $3.07.

(251) I identify also voucher No. 1,585 paid by me to Thomas Sommerville Company in Washington amounting to $18.60 for plumbers' goods, from L's and T's and iron pipe, etc.

Q. (Mr. MCLANAHAN) What was that needed for, Mr. Green? A. I don't know precisely. It is a little item of material of that sort amounting to $18.60 used evidently in some water supply connection for the needs of the work.

The voucher No. 1,591 was paid to William Pirie for travelling expenses, amounting in all to $6.36. I can explain that this voucher is evidently the voucher for his expenses on a trip which he made with me, which appeared in a previous

voucher to the Guilford Stone Yard in Guilford, Maryland.

Q. What are the items in that? A. The items in that are the mileage from Baltimore to Annapolis Junction, 18 miles, at 2 cents, 36¢; horse and buggy from Annapolis Junction to Guilford quarry and return, four hours at 25 cents, $1; mileage from Annapolis Junction to Washington, D. C., 22 miles at 2 cents, 44 cents; mileage from Washington to Guilford, Maryland, mileage from Washington to Laurel, Maryland, 18 miles at 2 cents, 36 cents; Laurel to Guilford and return, by team, paid for by Bernard R. Green per voucher 1,339—I paid for that myself, but that is put there to account for it. Then Laurel to Washington, D. C., railroad ticket, 15 cents; Washington to Baltimore, Maryland, and return on electric cars, $1.25; Washington to Baltimore and return on electric cars on the 21st, $1.25; Washington to Baltimore and return on electric cars, 28th $1.25; total, $6.36. That is sworn to and detailed according to the Government system.

Q. The other voucher had a team at $3.50? A. Yes.

Q. Was that on a different trip, or how does it come in there? A. It is mileage from Baltimore to Annapolis Junction—

(252) Q. Do you recall how that is? A. No, that I can not recollect, how we got together on that trip. We went down there together and came back, and if I had the other voucher, I guess I could hook them up and explain it.

The next voucher is No. 1,593, voucher paid by me to William Platt $10.50 in amount. This is for services as stonecutter on this work. It is three days at $3.60 per day. His name was on one of the payrolls, but being absent at the time of the general paying off, he was paid on a separate voucher and his receipt is attached here signed by himself.

The next is voucher No. 1,597 and was paid to the B. & O. Railroad Company upon an order that had been given them to reload stone in Mr. Graham's stoneyard in accordance with the terms of the said letter attached hereto, charged 75 hours labor at $1.30 per hour, $97.50. One grappler, $10; that is an iron affair to take hold of the stone with; total amount $107.50. I paid that voucher.

Q. What was it for? A. It is explained here in the order which is attached, which requires them to furnish the National Museum building the necessary hoisting by their crane car for the reloading of the Bethel granite in Frank F. Graham's yard, in accordance with the terms and conditions of their letter of April 23, 1908, at the rate of $1.30 per hour, and for additional men necessary beyond crane man and one conductor, at the rate of 30 cents per hour; furnish also one grappler at $10, that is to handle the stone with. The stone is to be moved to the cars and loaded ready for shipment by

John Carlson, of 533 Smallwood street, Baltimore, Maryland, excepting the bare hoisting of the stone by their crane car. It is necessary for us to hoist the stone on the car and to have the means of doing it.

Q. That is when you got the stone out of Graham's yard? A. Yes, sir.

Q. Do you know if those services were performed? A. I know we got the stone, but I did not see that performed.

This is voucher No. 1,599, which consists of a pay roll in (253) seven sheets for the mechanics, laborers and all those engaged upon the work at the National Museum building of cutting and completing the stone work under Mr. Graham's contract. This was for the second half of the month of July, 1908. The signatures are on the roll of all the individuals who received the pay.

Q. (The COURT) What is the total amount of that voucher? A. The total amount is $8,763.05.

Q. What do those signatures there show? A. They show that each respective individual who received pay on the roll received it according to the time they worked and the services they performed. This (indicating) is voucher No. 1,602, paid to F. W. Bolgiano & Company.

Q. (The COURT) What number? A. No. 1,602. Paid to F. W. Bolgiano & Company, Washington. It is for 200 lbs of rock salt at 90 cents per hundred pounds, total $1.80, signed by the creditor and certified by me. This salt was used like the salt in the previous vouchers for the tool sharpening.

Q. Did you pay that amount? A. This is voucher No. 1,605, paid to J. J. Crowley by me, for 36 pounds pitching tool, at 14 cents a pound, $5.04. Those pitching tools were furnished and used on the Graham work at the National Museum building.

Q. And that is a voucher paid by you? A. Paid by me: yes, sir. This voucher No. 1,610, was also paid by me to George F. Muth & Company, paint material, one quart orange shellac, 65 cents; half gallon asphaltum at 80 cents a gallon, 40 cents, amounting to $1.05 for use in the stone cutting work under the Graham contract on the National Museum building. The next voucher is No. 1,612, paid the Potomac Electric Power Company in Washington, $22.61, for the use of electric current furnished by that company for running the grindstones and mechanical tools on the cutting work for the Graham work on the National Museum building, and was paid by me.

Q. Do you know if that electric current was supplied? A. I know the tools were being run by the electric current all

(254) the time, and this was a payment on that account. I did not read the meter myself, but I saw the tool running all the time. The next voucher is No. 1,619, paid to the Merchants Transfer & Storage Company in Washington for drayage, from B. & O. freight station to National Museum building, rough granite for south pavilion, to be cut by the United States in completing the annulled contract of F. E. Graham. The voucher is made up here by enumerating the number and weight of the loads of each of a long series of freight cars and amounts to $1,304.19 for that item, and the same *part* was paid $2 for for hauling four wire guys from storage yards of George A. Fuller Company to National Museum building, and was paid $3.50 for hauling desk, chairs, case, etc., from Library of Congress to National Museum building. These were pieces of furniture needed in the office of the foreman in the keeping of the accounts.

Q. Did you buy any furniture? A. I did not.

Q. What was the furniture mentioned in this item? A. It was furniture which belonged to the Government and was in use in my office at the Library of Congress, at my headquarters, and it was simply borrowed for this use and was not purchased on Mr. Graham's account.

Q. Was this voucher paid by you? A. Yes, sir; and we did that sort of thing every time we could.

Q. Do you know if those services were performed? A. Those services of hauling—yes, sir; I know that the main part of the material was transported to the building by somebody. I did not see that done myself.

The next voucher is No. 1,625, the pay roll for the first half of the month of August, 1908, on this work; the pay roll is in seven sheets, the force having continued pretty much the same; it took about the same length of payroll for each month's payment of seven weeks; this amounts to $8,029.78 for services, the same as in the previous payrolls which I read and described here and for the same work. It is certified by me and the payments are made as attested by the signatures in the column of signatures by each of the respective individuals who (255) received pay on this account. The next is No. 1,633 payable to John H. Houser, amount $153.13, Mr. Houser, as in the previous vouchers with his name on them was a teamster and drayman and this was for the hire of a stone wagon for hauling granite about the building from July 1 to 31, 1908, 28½ days at $5 per day, $143.13; that granite being in the rough, it had to be moved about from the piles and placed for the purpose of being cut as required in the fulfillment of Mr. Graham's contract. The hire of those stone wagons amounted to 28½ days at $5, that was $143.13, and there was also an item

for the removal of ten loads of stone scrap at $1 per load, $10, and the total amount was $153.13 paid by me.

Q. Do you know if those services were performed? A. I know the wagons were there; I saw them being used, and it is my evidence that the services were performed.

The next is voucher No. 1,636, that is the pay roll for the second half of August, amounting in all to $8,153.52. The pay roll is in eight sheets this time. The roll is of the same sort for the same purpose and covering the pay of the people employed in the second half of August and was signed and certified by me as before. There were eight sheets in that roll because the roll is somewhat longer than the previous ones and amounts to correspondingly more money.

Q. (The Court) How much? A. $8,153.52.

Q. (Mr. McLanahan) Was this amount of money paid out by you? A. It was. The next voucher is No. 1,637, to the amount of $2.25 paid to Harvey Counselman; he was a tool boy—a water boy—he carried the tools from the stone cutters to the blacksmith's shop and had them sharpened and brought them back, and he served drinking water to the men as is usual on such work. This voucher is for three days in the latter half of August, 1908, amount $2.25; that is 75 cents a day, 3 days. That was paid in the usual way.

Q. Do you know why he did not get on the payroll? A. I cannot say, except that he was probably not to be found at (256) the time the general roll was paid; his name was therefore ruled off and stated in the voucher and payment was made independently by the check. The next voucher is No. 1,638, to Durkin, Reeves & Company, amounting to $4 in all. It was for a duplicator, letter-size, 9 x 12 inches, with black ink. That was some convenience in the office for keeping the records.

Q. Was that paid by you? A. It was.

Q. In what form? A. It was by check.

Q. Do you know whether the duplicator was furnished? A. I don't know positively. The next voucher is No. 1,647, amounting to $8.15 and was paid—it was transferred through the Treasury account to the appropriation for printing and binding of 1908. This was for printing and furnishing 2,000 diagrams for granite, and the amount charged to us by the government printing office was $8.15, and that amount was reimbursed to the Government Printing Office as is the usual practice in the Government system. All printing and binding must be done according to law by the Government Printing Office so that we can not go out in the market and get printing done but it must go through the Government Printing Office and

this was done that way and the payment was transferred from the one appropriation to the other.

Q. That binding is for what? A. This is simply for printing 2,000 diagrams for granite. These are cards printed in blank and are arranged for drawing out by the draughtsman on each separate card the diagram of the stone to be shaped up and dressed for the guidance of the stonecutter. I have in my hand one of the cards containing the diagram on it and the name of the foreman is here, John Moginnin—he was the foreman. This contains a diagram and the dimensions of the stone for the guidance of the stonecutter, to keep track of it until it is all finished. Every stone is shaped up and finished up in that way. And the diagrams are made up very much as if it was the whole building. It has a perspective drawing and dimension. The next voucher is No. 1,649, amounting to 30 (.257) cents, paid to the Chesapeake & Potomac Telephone Company, covering a long distance call from Washington to Baltimore.

Q. Was that call made by you personally, do you know? A. It was made by my office; whether I made it myself individually, I do not remember.

Q. You don't remember what it is for? A. No, it is a call from Washington to Baltimore. It was for the purpose of this work and was needed by it.

Q. Did you pay that amount? A. I paid the amount; the next voucher is No. 1,656, and was also paid to the Chesapeake & Potomac Telephone Company and contains several calls—ten of them—all from Washington to Baltimore except one, which was from Baltimore to Washington, and totalled $3.70. The subticket attached here with the charges show the separate calls and they are attached to the voucher.

Q. Can you tell who made those calls and what they were made for? A. I think not—yes, I think these checks here show who they were made by. Here is one from B. R. Green; the next is from B. R. Green; the next from Mr. Sheehy, my chief clerk, who is present here in court. The next is from Mr. Piric, the foreman in charge of the stone cutting, who is also present in court; the next is from Mr. Sheehy.

Q. Can you tell those calls were that you have down there, personally, what they were for? A. Well, the next is made by Mr. Sheehy; the next by Sheehy; the next by Sheehy; and the next by the same, the next by the same; my chief clerk made most of them. I do not remember what they were about.

Q. What are the dates of those calls of yours? A. The first one here is marked April 18, 1908; the next is April 20, same year; the next April 24—some of these were by Sheehy and some by Piric; the next is April 24; the next May 6th; the next is also May 6; the next May 7; and the next is May

7; the next is May 11, and the next May 12, all 1908. The next voucher is No. 1,660, being a payroll in seven sheets for the (258) first half of the month of September, 1908, amounting to $7,842.10. This payroll is for the employees upon this work of Mr. Graham's at the National Museum building and is in the usual form and signed by the individuals who received the pay and is certified by me and paid under my management, as usual.

Q. Did you pay the voucher for those telephone calls. A. I did. I also paid this voucher No. 1,667, amounting to $230.25 to John H. Houser, he being the drayman. This item is for the use of his teams for hauling stone from shed to building, during the month of August, 1908, 30½ days at $5 per day amounting to $151.25, and also for removing stone scrap during the month of August, 1908, 79 loads at $1 making a total of $230.25.

Q. Do you know if that was paid? A. I saw that work going on and I have no doubt that it was all done according to the count, and it was paid for. ".

The next voucher is No. 1,682 and was paid by me to the amount of $55.98, to D. Allen's Sons Rope Company, Brooklyn, New York, for furnishing 500 feet manilla rope, 2 inches diameter, 616 pounds at 9¼ cents per pound, net, $56.98. This was rope purchased for the use of the derrick work in the handling of the stone under the Graham contract on the National Museum building and the purchase was ordered after inquiry of Allen's Sons Rope Company as to the price and time of delivery and so on and was answered by the letter from that company:

"Brooklyn, N. Y., August 11, 1908.

"Answering yours of yesterday. We quote 9¼ cents pound for 500 feet 2 inch diameter Manilla rope, delivered net weight, free of transportation charges, at the Museum Building, Washington, and can ship immediately upon receipt of order.

"Hoping to be favored with the order, we remain,

Very respectfully,

D. ALLEN'S SONS ROPE COMPANY."

The order was accordingly sent them, the prices being (259) deemed satisfactory and fair and the rope was furnished and paid for by this voucher.

Q. Do you know whether or not the rope was furnished? A. I have the evidence of the rope being there. I did not

measure it myself, but we had the rope there in use, to my knowledge.

This next voucher is No. 1,672 to the amount of $46.52, paid to the American Ice Company in Washington for furnishing ice during the months of July and August, 1908, in accordance with a circular letter and competitive proposals in which this was the lowest bid, at 30 cents per 100 pounds; the total amount was $46.52. This was for cooling the drinking water of the workmen on the job.

Q. Was that paid by you? A. Yes, sir.

Q. Do you know whether or not the ice was furnished? A. I saw considerable amounts of it about there all through those months. We did not buy ice anywhere else. We did not get any anywhere else. The next voucher is No. 1,676, to the amount of $5.50 paid by me to C. L. Wolfsteiner Company, incorporated, of Washington, for a No. 24 guage galvanized iron smoke hood for the blacksmith's forge. The total amount was $5.50. I paid that and I know that our forges all had hoods on them.

The next voucher is No. 1,679 paid to J. J. Crowley, amount, $58.32. Crowley was a blacksmith in the city, and was employed to make 52, three-quarter inch points at 6 cents each, $3.12; 340 pounds, three-quarter inch granite points, at 12 cents, $40.80, and 36 split chisels at 10 cents each, $14.40, making a total of $58.32, which I paid to Mr. Crowley in the usual way, and I know that we must have had the points, etc., delivered there because there were plenty of them in use and they were needed on the work.

The next voucher is No. 1,684, paid by me to James B. Lambie Company, incorporated, for two 6 inch spring check rings at $1.50 each, $3, and 25 feet of one half inch belt lacing, at 2 cents per foot, 50 cents, and eight feet four inch oak tanned leather belting at 77 cents $6.16; the total amount was $9.66. This was required there for belting the machinery, (260) for running the grind stones.

Q. Did you pay the amount of this voucher. A. Yes, sir.

Q. Do you know if the material was supplied? A. Yes, sir. I saw it there. Voucher No. 1,686 amounting to $3.75, paid to Littlefield, Alvord & Company draymen in Washington. Drayage of three grindstones, from Norfolk and Washington's Steamboat Company's wharf to building for National Museum 5,375 pounds, $3.75. I paid that and I saw the grindstones there after they were delivered, so I know they were furnished and they *must* have been hauled up there by somebody, and we did not pay anybody else but this party for doing it.

The next is No. 1,689 amounting to $65 and paid to W. A. H. Church, lumber dealer, for furnishing lumber which is enumerated here and amounts to $65; for furnishing 100 pieces Virginia pine and so forth, which was used for the sheds in protection of the stonecutters on the work and was paid by me. This purchase was made after inquiry from three different lumber dealers whose bids ran from $65.72 up to $68, and Mr. Church was the lowest bidder.

Q. Well, there is a reduction on the face of that voucher of 72 cents; can you explain that? A. I don't know, unless the material may have run short a trifle when it arrived.

Q. Well, look at the order and see what the order is for and the total price in the order? A. The price in the order is $65—yes, this explains it. The bids received were received by telephone as is stated here on the slip which is attached to the voucher, and in this telephoning the three bids as shown by this slip are respectively $65.72 by Mr. Thomas W. Smith, $66 by Mr. W. A. H. Church, and $68 by Eissinger Bros. I did not notice that Mr. Church's bid was the lowest by 72 cents.

Q. Well, who got the contract. A. The order went to Mr. Church instead of to Mr. Smith, as Mr. Church was the lowest bidder by 72 cents. In reading it off the slip I thought it was Smith instead of Church. That was the lowest bid. (2951) $65, and the order was given to him.

Q. Did you pay the voucher? A. Yes, sir.

Q. Do you know whether or not the material was furnished? A. I did not see it. The next is No. 1,692 for 75 pounds of rock salt, 68 cents, to F. W. Bolgiano & Company. I paid that voucher to him for the salt. That was used like the other salt furnished for the cooling water of the blacksmith's forges and sharpening tools.

Q. Do you know personally whether that salt was furnished? A. No, sir; I can't say that. The next is voucher No. 1,698 paid to Lanburgh & Brother, amounting to $21.10 for 50 yards, No. 1 brown sheeting at 21 cents per yard, in accordance with order No. 183 attached hereto—$10.50 and 50½ yards brown sheeting at 21 cents per yard, $10.60 on another date.

Q. What was that for? A. For shelters and screens for the protection of the workmen from the sun, and it was purchased the same as the previous sheeting was purchased from the same party, at the same price, and was obtained in the first case by a competitive proposal, they being the lowest bidders.

Q. Why was it you needed this additional amount? A. Because some of it were cut in the progress of the work, and more men later on had to be employed out in the open where it

was necessary to increase to some extent the quantity of protection of that kind.

Q. Was the amount of that voucher paid? A. Yes, sir; it was paid.

Q. Do you know whether the sheeting was furnished? A. I could not say, but I know we had additional sheeting there as required.

The next voucher is No. 1,700 and was paid by me to Rudolph & West Co., in the amount of $8.88 for 12 rolls 2 ply tarred roofing felt at 70 cents per roll, and 12 pounds roofing nails at 4 cents per pound, totaling $12.88. This was used for the rainproofing of the wooden sheds or shelters for the use of the stonecutters.

(262) Q. Did you pay the amount of that voucher? A. I did.

The next is No. 1,705, paid to Harrison Supply Company, amount $63.94, for furnishing three grindstones, which were supplied according to previous vouchers amounting to $63.94. The Harrison Supply Company is in Boston, and that amount was paid.

Q. Do you know whether or not the grindstones were supplied? A. Yes, sir; they were.

Q. Why did you need new grindstones? A. Because the others wore out.

Q. How constant was the use of these grindstones? A. Pretty nearly constantly. They were running all day long. There were a number of stone cutters and the stonecutters were constantly grinding their chisels on the grindstones. These grindstones at the plant like that are running all day long and are in use almost constantly by one or another of the workmen. This voucher is No. 1,709, paid to Thomas H. Dallett Company, Philadelphia, for six stop cocks for air hose at 60 cents each, $3.60. I paid that voucher.

Q. What are they used for? A. The stopcocks are used for controlling the air supply by the air compressor through the hose to the stonecutting tools, known as the pneumatic tools. I saw them there and I know they were furnished.

Q. And you paid the voucher? A. I paid the voucher. Another voucher for the same party, No. 1,711, $20. This voucher was for the rental of one steam driven air compressor and air receiver, complete machine, in accordance with a circular letter of May 14, 1908, sent out for proposals and for the use of this machine from August 21, 1908, to September 20, 1908, one-third of a month at $60 per month, $20. I paid that voucher. It was used for compressing the air and operating the air tools, that is, these pneumatic tools used in the cutting of the stone.

(263) Q. Why is that charged one-third of a month? A. Well, that is all the time it was used. The rate agreed upon was $60 a month and it was used only one-third of a month and therefore we only paid for its use for one-third of a month.

Another voucher, No. 1,713, to Thomas H. Dallet Company, Philadelphia, to the amount of $57.60, for rubber air hose and hose clips, nipples, stopcocks and also for the rental of the air compressor as in the last voucher, that is, this is for its rental from July 21, 1908, to August 20, 1908, inclusive, one-sixth of a month at $60, $10, and also for two-thirds gallons pneumatic tool oil at 60 cents per gallon, $1; totalling $57.60.

Q. Did you pay the amount of this voucher? A. Yes, sir; I did. I know that the apparatus mentioned was there and was used on the work.

Q. And you know the material mentioned in the last voucher was used? A. Yes, sir. Voucher No. 1,717, is the next, and is the pay roll for September, 1908, $6,833.62, it is in seven sheets this time. This is like the previous pay rolls and was made out in the same way and signed in the same way, and it was certified by myself and covered the pay for that period of the employees on the work on Mr. Graham's account—that carrying out of his contract.

Q. Was the amount set forth in this voucher paid? A. That amount was paid. The next voucher is No. 1,721, for the amount of $3.59 and was paid by me to the Thomas Somerville Company in Washington for 75 feet of ¾" black iron pipe, for bushing, rough stop cock and rough hose bibb cock; total amount $3.59. This material was for the pipe work in connection—now, I can't say positively, but it is either for the water supply or the pneumatic tools. I don't know which.

Q. Was the amount of that voucher paid by you? A. It was. Voucher No. 1,722 paid to the same party, Thomas Somerville Company, for another series of items, black iron fittings, pipe, bushings, handle stopcock, plug and short black nipple, total amount $8.71. I saw the piping and materials in use there and I paid the voucher. The next voucher is No. 1,725, paid to the hardware firm of James B. Lambie (264) Company to the amount of $52.32, for steel used in making the granite cutters' tools, 12 sheets of galvanized sheet iron, five rolls tar paper, wire nails; six sheets of galvanized iron and 11 sheets of galvanized iron, that being another item, the whole amount of the voucher being $52.32.

Q. You paid the amount of that voucher? A. Yes, I paid the amount of that voucher. The material in it is such as had to be used in the work in connection with the machinery and I don't know of the particular details.

Q. You did not see that stuff come in yourself personally? A. No, but I saw it used there. Voucher No. 1,726, paid to the Merchants Transfer & Storage Company, total amount $612.48. This is for drayage from the Pennsylvania Railroad freight station to the National Museum building, of rough granite for south pavilion, to be cut by the United States, etc., and it covers two or three sheets containing the numbers and the load upon a series of freight cars. The total amount is 3,062,100 pounds at 10 cents per ton of 2,000 pounds, in accordance with a circular letter and so on, under which the order was given to this party, and the drayage was performed. It amounted to $612.48, and it related fully to the granite being furnished to that building from the quarries in Vermont, for carrying out the Graham contract. I paid that amount and I saw the greater part of the stone hauled in.

The next voucher is No. 1,727, paid to J. B. Kendall, to the amount of $33.88 for outfitting of a blacksmith forge, bellows, a couple of feet of shafting, a bar of Norway iron and 12 one and one-half inch square cold punched tapped nuts—the total amount was $33.88. That was for equipping a forge for sharpening tools.

Q. Was the amount of that voucher paid? A. I paid the voucher.

Q. Do you know if that forge was supplied? A. No, I cannot say as to that particular individual forge. We had an equipment of forges there and it was increased from time to time as the work increased.

(265) The next voucher is a pay roll, voucher No. 1,733, to the amount of $6,374.84. It is in seven sheets. It is like the other payrolls and it is signed by individual mechanics and workmen on the roll for the first half of the month of October, 1908. I paid it and certified it as usual.

The next voucher is No. 1,740 and is also a pay roll for the second half of the month of October, 1908, to the amount of $7,977.61. It is a voucher like all the others and was paid by me and is receipted and certified by me.

Q. That voucher was paid, was it? A. It was. This is voucher No. 1,743, to the amount of $79.50 paid to the Washington Gas Light Company for furnishing and delivering coke for the use of the blacksmiths in the forges, 900 bushels of coke at 8 cents per bushel, $72, and cartage on 15 loads at 50 cents, $7.50.

Q. What was that coke used for? A. In the blacksmiths' forges for sharpening tools, which tools were used in the stone-cutting on this Graham contract. The total amount was $79.50.

Q. You paid the amount of that voucher? A. Yes, sir.

Q. And do you know whether the coke was supplied? A. I know a great deal was. The next is voucher No. 1,746, was

paid by me to the amount of $155.04 and was paid to Mr. J. J. Crowley for making 244, 7" granite points and for other material to the amount stated. This was for tools used and needed for the Graham contract of stonecutting on the National Museum building and was paid by me.

Q. Do you know whether or not those materials were supplied? A. Yes, inasmuch as we had the necessary tools there.

The next voucher No. 1,748, was paid to John H. Houser, amount $103.12, for the use of one two-horse team for hauling stone from shed to building during the month of September, 1908, 20½ days at $5 per day, $103.12, and one four horse team one-half day, at $10 a day, $5, making a total of $103.12. I paid that amount to Mr. Houser.

(266) The next voucher No. 1,754 to the amount of 50 cents, was paid to the Knox Express Company, of Washington, for the drayage on one bag of shot and two sheets of zinc, from Library of Congress to the building for the National Museum. That was loaned or it was a surplus for which nothing was charged and it was loaned from the Library building to the Museum building for use without charge in the finishing of the Graham contract.

Q. What was that shot used for? A. I don't know. I don't know what kind of shot it was. If it was steel shot it might have been used for sawing grooves in the granite.

Q. Did you pay the amount of that voucher? A. Yes, sir. The voucher No. 1,757, amount, $5.97, paid to James B. Lambie Company, for one keg wire nails, 60x 10 inch three cornered saw file, at $2.25 per dozen, and one roll two ply tarred paper, 100 feet, one-half inch belt lacing, total bill, $5.97, and was used for the shelter shed for the workmen and this belt lacing was for the belt on the machinery.

Q. Did you pay the amount of that voucher? A. I did.

Q. And this was used on the same contract? A. Yes, sir. The next is voucher No. 1,761, paid to J. Jacob Shannon and Company, Philadelphia, Pa., for two wire rope sheaves metaline bushing at $3 each, $6; those were needed and used in the rigging for handling the stone under the Graham contract.

Q. Did you pay the amount of that voucher? A. I paid the amount of that voucher.

Q. Do you know whether or not this material was furnished? A. Yes, I know we had the material there at the building.

The next voucher is No. 1,765 paid to the Harrison Supply Company, $137.83. This was for three grindstones. They were 60 inches by 5 inches in accordance with the letter of inquiry. The price was $63.94. Also 100, ⅜ inch quarter octagon black diamond steel stone points for cutting stone,

$73.89, total, $137.83, paid by me, and I know that the grindstones were there.

(267) Voucher No. 1,767, paid to John H. Houser, $61.25, for use of team for hauling stone from shed to building during the month of October, 1908, 12½ days at $5 per day, $61.25.

Q. Was that voucher paid by you? A. Yes, sir.

Q. And the services are performed that are mentioned in that voucher? A. I can not say specifically.

Voucher No. 1,769 I paid to the American Ice Company, to the amount of $19.02 for furnishing ice to the building for the month of September, 1908, for the use of the workmen employed on the Graham contract.

Q. Was the amount mentioned in this voucher paid by you? A. Yes, sir. Voucher No. 1,771, like the last voucher mentioned and for the same purpose, the furnishing of ice during the month of October, to the amount of $23.99 and it was paid by me to the American Ice Company.

Voucher to Thomas H. Dallett Company of Philadelphia, $20, for the rental, as heretofore, of a steam driven air compressor for operating pneumatic tools for one-third of a month, for September, 1908, at $60 per month, total amount, $20. I paid that voucher and I know that those services were rendered.

Q. Will you look again at voucher No. 1,771 and just state how much of that voucher was charged to Mr. Graham and why it was so charged? A. Only one-half of it was charged to Mr. Graham. That voucher was paid. That may be the case with some of the other vouchers.

Q. Do you know why only one-half was charged to Mr. Graham? A. It may be only one-half was used on that account. The ice was delivered for use on the whole building and we divided it between the two classes of work, one to be charged to Mr. Graham and the other to the Government. We only charged him for his share.

Voucher No. 1,776, to J. B. Kendall Company, iron merchants, for 60¼ pounds of 1¼ inch round Norway iron at $3.75 per 100 pounds; that was for use in handling the heavy stones.

(268) Q. Was that voucher paid by you? A. It was.

Q. Was that iron supplied? A. I cannot say that personally.

The next voucher is No. 1,799, paid to the National Electric Supply Company, for carbon brushes, total amount one dollar. The carbon brushes were to replace brushes that were worn out on the motor operating the grindstones to be used on Mr. Graham's contract. I paid that voucher.

The next voucher is 1,793, being a payroll in seven sheets for the half of the month of September, 1908; total amount

$6,345.61. It is the same kind of a payroll and made up as paid in the same way as the previous pay rolls on this account had been, and it is signed individually by the persons receiving their pay and it is certified by me. I paid that.

The next voucher No. 1,794, and is for the amount of $3.60. It was paid by me to Emmesley Casey; the voucher is certified and he received it for his pay as stonecutter for one day at $3.60. And the total amount of the voucher is $3.60. It was paid in this way by check because evidently he was not present when the payroll was paid out and his name was taken off the payroll and he was paid separately by the voucher.

Q. Was that amount paid? A. It was. This is voucher No. 1,797 paid to George A. Fuller Company, amount $882.86. This was for the rental of a boom derrick in accordance with a circular letter of April 11, and an order for its rental at $15 a week, $141.43; also for the rental of a steam hoisting engine in accordance with an order of April 15, for 29 3/7 weeks at $15, $441.43, making a total of $882.86; the steam engine and boom derrick went together and each was rented at the same price.

Q. Do you know whether the derrick and hoisting engine mentioned in there were delivered and used? A. Yes, sir; they were delivered and used, and the rental was made after competitive proposals received according to the account attached to the voucher. The proposals were received from six differ-
(269) ent parties and George A. Fuller's price was the lowest. They appeared on a previous voucher that was read to you.

Q. Did you pay this amount? A. Yes, sir; I paid the amount of that voucher. And, I know that the engine and derrick were used on the work. Voucher N. 1,798 is to George F. Muth Company, Washington, amount thirty cents, for fifteen pounds of Princess metallic drying at two cents a pound.

Q. What is that for? A. I don't know; I suppose for painting some iron work to keep it from getting rusty.

Q. That is a kind of paint, is it? A. Yes, sir.

Q. And you paid that voucher? A. Yes, sir:: the next voucher is to George F. Muth and Company, No. 1,799, paid to the amount of $3.15 by me, for a dozen lead pencils, five gallons A cylinder oil, used for oiling machinery and some blue black ink; that was used by the draftsman in their work.

Q. Was this voucher paid by you? A. It was. The next voucher is No. 1,805, paid to Johnson Brothers, amount $104.-20, for furnishing bituminous coal for the Graham stone work, 14 2/10 tons at $4.25, amounting to $60.35, and for furnish-

ing other coal for the operation of the engine and boiler for the air compressor, 29 tons; another time, one ton—this second item of coal for the air compressor amounted to $131.54 and one third of that amount only was charged to the Graham contract, because in the meantime the compressor was used on work for the Library building outside of his contract. I mean Museum building. The amount charged is $43.85, making a total amount of $104.20 and was for use on the Graham work and was paid by me. The next is voucher No. 1,811, paid to W. A. H. Church, lumber dealers, amount $8.40 for fifteen pieces dressed number 1 white pine. That sort of material had to be used and was used in the work for making what they call straight edge and making little patterns and so on, used in the process of shaping up and preparing the finished (270) stone. I paid that voucher.

Q. Do you know whether or not personally that white pine was supplied? A. I saw it there afterwards. This voucher is No. 1,819 paid to the Adams Express Company, thirty cents, for one package of stop cocks, from Philadelphia, Penna., to Washington, D. C., thirty cents. These stop cocks were required and were furnished for the air compressor. They were used on the Graham work.

Q. Did you pay the amount of that voucher? A. I did. This next voucher is No. 1,821, amount $12.40, paid to the Washington Gas Light Company for furnishing coke, 180 bushels, and for the cartage on the same, 8 loads at 50¢, totalling $12.40. That was paid by me. That was coke used in the forging in the black-smithing on the Graham contract. Voucher No. 1,825 paid to the Thomas Sommerville Company, $18.55, for furnishing for the Graham work, 169⅝ feet ¾ inch pipes, and various little items of pipings, fittings, bushing, nipples, four pounds "Peerless" Packing, 1 Jenkins globe valve, amounting in all to $18.55. I paid that voucher, and I know that we had this piping at the building and that it was used in extending the air supply from the air compressor to the tools, and some for the water supply in connection with this work and indispensable to it. This is number 1,836, and is in six sheets, being a pay roll for the second half of November. The amount of the payroll is $6,114.71. It is a pay roll like previous ones read, for the services of employees in doing the work on the stone cutting on Mr. Graham's account at the National Museum Building and is signed and receipted in the usual way by all the payees and certified by myself and paid by myself. Voucher No. 1,835 is to the amount of $20, paid to Thomas H. Dallett Company, Philadelphia, for the rental of the steam driven compressor and air receiver used and referred to, for one third of a month at $60 per month $20.

The charges for it upon the Graham contract were only for the time that it was actually used on that account.

Q. Was that amount on that voucher paid by you? A. (271) Yes, sir; it was paid. The next voucher is No. 1,842, paid to Crow & Holden, of Barre, Vermont. The total amount of that bill is $90.85 for furnishing pneumatic tools, stop cocks, nipples, and fasteners and so forth in itemized amount, making up a total bill of $90.85. These were for use along with similar apparatus purchased before for the same work on the Graham contract.

Q. These were all used on the Graham contract? A. All used on the Graham contract.

Q. Did you pay the amount of this voucher? A. I did. The next voucher is No. 1,851, paid to John H. Houser, in the amount of $7.50, for the use of his team for hauling stone from shed to building during the month of November, 1908, 1½ days at $5 per day, $7.50. That was on account of the Graham contract and was needed and used for that work. I paid that voucher. The next voucher is No. 1,856, being a payroll for the first half of the month of December, 1908, made out in the same way and receipted and certified, for the account of the Graham contract, as all the previous pay rolls.

Q. (The Court) How much was that? A. A total of $6,523.06.

Q. (Mr. McLanahan) That amount was paid by you, was it? A. It was. The next voucher is No. 1,859, paid to John Manning, amount, ninety cents, it was for his services as stonecutter at the National Museum building on this work, and he was taken off the pay roll and paid independently.

Q. Was that payment made by you? A. It was.

Q. How was that paid, in cash, or by check? A. By check.

Q. But what does this receipt mean up here? A. This is the receipt for the check for payment.

Q. What does that mean "part of check"? A. It means (272) he was paid by cash from a check which amounted to more, the remainder of the cash being used for something else; paid in part by check.

Q. So that the check would show this amount and some others under the total amount of the check? A. The total amount of the check—no, I don't think the check will show that.

Q. I mean the total amount of the check will cover this payment and some other payments also? A. Yes, sir; it would, it would all be referred to on the various vouchers.

Q. And that check was drawn to your order, was it? A. Yes, drawn to my order. They always draw them to my order where it is a matter of cash. The next voucher is No. 1,867, a pay roll in six sheets for the second half of the month of December, 1908, amounting to $6,624.77. I will make the statement in regard to this payroll as I have made in regard to all the previous ones in all respects.

Q. And that was paid by you? A. Yes, sir; paid by me as all the previous ones. The next is voucher No. 1,868 and is a pay roll in the amount of $10,199.47, and it is in eleven sheets and it is for the second half of December, 1908.

Q. Will you look at the sheet I now hand you and tell out of the total amount of this payroll how much was charged to Mr. Graham?

The COURT: Was that the last one?

Mr. McLANAHAN: Yes, the total was $6,000 and I want to know how much of that was charged to Mr. Graham?

The WITNESS: This is a general pay roll on behalf of the National Museum building. Work on the Graham account was drawing so close to the end that I suppose that this payroll which is on account of the general building and not wholly on account of Mr. Graham, as the previous pay rolls were, contains the names of three persons, one was a carver and the other two were stonecutters, G. Branthi, William English and R. (273) Conroy—no, it is not English it is Elmer Clemons—those three men one got $2.25, another gets $10.35, and the third one gets $10.35. Those three amounts were charged to the Graham account because their services were put in on that account, but the services on the rest of the payroll are not charged to the Graham account.

Q. What are those charges? A. $2.25; $10.35, and another $10.35; three altogether.

Q. I notice that two of these men were carvers. A. Yes, sir.

Q. What was the work that they were doing? A. They were working on carving in these little ornaments, called modillions up under the cornice. It is some work that belonged to the Graham contract. The Graham contract included some small amounts of carving and these men were working on those small amounts.

Q. (The COURT) Have you stated the amount of the voucher? A. Yes, those three items which I mentioned.

Q. (Mr. McLANAHAN) The total of these items is $22.95 and is charged on that pay roll. A. Yes. The next is number 1,847, paid to James B. Lambie Company, hardware merchants in Washington, D. C., to the amount of $14.17. That is for a keg of ten penny wire nails, 2 kegs of 8 penny wire nails, one dozen 36 inch sledge handles, one dozen 16 inch flat files and one pound of copper belt rivets totalling altogether $14.17. I paid that voucher.

Q. Do you know whether or not— A. (Interrupting) I don't know specifically whether they were supplied. I know we had to use that kind of material in the work.

Q. Were payments mentioned on that last pay roll voucher paid? A. They were. The next voucher is Number 1,877, to J. B. Kendall Company, $91.06 for a number of items of Norway iron and black diamond tool steels, quarter octagon black diamond tool steels, which were required for making tools for stonecutting, amounting altogether to $9.06, which was material which we had to have and did have to use in the stone-
(271) cutting under the Graham contract.

Q. Did you pay the amount of that voucher? A. I did.

Q. State whether or not that is a reasonable price for those articles? A. It was.

Q. Do you know whether those articles were supplied? A. I know it by the fact that these articles were there and they could have come from nowhere else. The next voucher is No. 1,879, paid to the Potomac Electric Power Company, $129.75 according to the attached subvoucher for the meter reading of the motor.

Q. How much of that total was charged to Mr. Graham? A. A total of $129.75, which ran from August to November, 1908, and of this total three quarters was charged to the Graham account.

Q. Making how much charged to him—does it appear there? A. It does not appear; it was three quarters of $129.-75. That is explained the same as before. The current came from one power company for the whole building and it was by careful estimate divided between the building and the Graham contract.

Q. Was the amount of that voucher paid? A. Yes, sir.

Q. Was the current supplied? A. It was. The next voucher is Number 1,893, paid to the Thomas H. Dallett Company of Philadelphia, for continuing rental of the steam rivet air compressor and receiver for this work, amounting to $24 in all, on third of which was charged to the Graham contract.

Q. How much of this voucher is charged to Mr. Graham? A. One third of the amount that would be $8.

Q. Was the amount of that voucher paid? A. It was.

Q. Was the compressor furnished? A. Yes, sir.

Q. The compressor mentioned in that voucher? A. It was. It had been there all summer and this was a rental account from time to time. The next voucher is No. 1,891, (275) paid to the same party, to the amount of $36, for the use of the same apparatus from December 3rd up to December 20th, being 18 days at $60 a month, total $36. That was paid.

Q. Was the amount of that voucher paid? A. It was.

Q. Was that steam driven compressor furnished? A. Yes, that is the same one already referred to. This (indicating) is an account paid to the American Ice Company, voucher No. 1,896, to the amount of $2.87, which was payment for the ice furnished on the Graham account and for the ice previously furnished.

Q. Was that voucher paid by you? A. It was. This voucher is No. 1,899, and it was a payroll of the National Museum Building in ten sheets. The total amount of this payroll is $8,578.57.

Q. How much of that total amount was charged to Mr. Graham? A. This is a general pay roll on the construction of the whole building containing individual names of all the employees and so forth, on which there is one name, that is John Viola, a stone carver, received $13.50 which was charged to the Graham account, because he worked on the Graham work. That is the only charge on this payroll to the Graham account, and it is to the amount of $13.50.

Q. Was that paid? A. Yes, that was paid to John Viola.

Q. What carving work was he doing? A. The same carving work described before. This (indicating) is voucher No. 1,900 and it is a pay roll in five sheets on account of the Museum building amounting to $6,123.90.

Q. Was that whole amount of $6,123.90 charged to the Graham contract? A. This pay roll was for the first half of January, 1909, and was all on account of the Graham contract.

Q. What is the total amount of it? A. The total amount of it is $6,123.90. It is made up in the same way and certified, signed and paid the same way. It was certified by me (276) just as described for the previous pay rolls in this account of Mr. Graham.

Q. And it was paid by you? A. Paid by me. Most of the pay rolls, this being one of them, were paid on the Graham account. They were separate from those from the general construction on the Museum building and on one or two occasions there were those individual names on the general building pay roll, which was charged to the Graham account, and

that was so noted and has already been explained. The only reason I hesitated in looking at this one was because I had just seen one of those other rolls and thought I had a similar one in my hand, but I see that this is a complete pay roll for the Graham account alone. About that time, we were getting along toward the end of the work.

Mr. HARLEY: With your Honor's permission, I have served on the other side a notice to produce all the invoices, and duplicate invoices, of cut stone shipped by the defendant Graham to Superintendent Green in Washington. I have served on them a notice to produce all these invoices and duplicate invoices, if your Honor please.

Mr. HILL: When do you want them produced?

Mr. HARLEY: I would like to have them right now.

(Papers produced and handed to Mr. Harley.)

Mr. McLANAHAN: Mr. Green, will you look at the vouchers which I now hand you, state the number of each voucher, amount of each voucher, and to whom the amount was paid, what the voucher is for and whether or not you have any personal knowledge as to whether the services mentioned in the voucher were performed or whether or not the materials mentioned in the voucher were furnished?

A. This voucher is No. 1903. It was paid by me to Thomas H. Dallett Company in the amount of $204.92, for 15 pneumatic tools, and for 350 feet of rubber hose, stop cocks, nipples, and clips, etc., amounting as I have already said, to $204.92. Those were purchased and received and used for the completion of the Graham contract at the New Museum build-
(277) ing in Washington.

Q. Was the amount of that voucher paid by you? A. Yes, sir. This voucher is No. 1,908, amount $4.21, paid J. C. McCubbin Company in Washington for some galvanized Iron Tees, ¾ bushings, 16 of them, 8 lever handle stop cocks, and 4 cast iron 45 degrees Ells, amounting to $4.21. They were furnished for the work on the Graham contract and paid by me.

The next voucher is No. 1,910, paid by me to Rudolph & West Company for some 12 rolls of tar roofing felt, some tins, 12 rolls of tar roofing felt again, roofing tin, etc., amounting to the sum of $24.14 paid by me for use in the carrying out of the Graham contract at the Museum building. The pur-

pose of it was for water proofing the shelter sheds for the stone cutters.

Q. What had happened to the felting you had gotten before of this character? A. They were probably worn out, but that was probably for the extension of the shelter as the work progressed.

The next voucher is No. 1,920, in the amount of $34.18, paid by me to J. W. Crowley for Blacksmithing work, for drawing drills and points, and sharpening tool chissels for the same work, for the Graham work, at the Museum building. Drawing drill and drawing points means as the steel gets worn down in the process of stone cutting, granite cutting, it is necessary to renew the points, to heat the drills just as a blacksmith does any piece of iron and draw it out when hot and recover the point in the sharpening of the tool for use.

Q. The total amount of what is that? A. $34.18.

Q. Was the work mentioned in this voucher done to your personal knowledge. A. I know that we had constantly to do such work as that to keep the tools in order as they were being used by the stone cutters in carrying on this work.

Q. Was the amount of that voucher paid? A. Yes. (278) Q. By you A. Yes, sir. This voucher is No. 1,927 paid to J. Baumgarten & Sons Co., for 4 Brass Door checks, 25 cents each, total $1. That was paid by me.

Q. What are they for? A. A door check is a little arrangement you put on a door to keep it from slamming.

Q. In connection with what were they used? A. I do not know precisely but I take it it was the office, the place where the master foreman, draftsman, etc., were housed.

This voucher is No. 1,933, paid by me to George F. Muth Company for ½ gal. Asphaltum and 1 pint of orange shellac, total amount 75 cts. The need of a thing of this sort was for the painting, or the *making* of the stone with a number in order to keep the record clear.

This voucher is No. 1,939, paid to James B. Lambie Company in the amount of 75 cents for 50 feet of ¾" raw hide belt lacing. The belt lacing was to repair the lacing of the belt belonging to the grind-stone machinery.

Q. Was that paid by you? A. It was. This voucher is No. 1,941 paid to John H. Houser for move loading of stone by his teams, 2⅜ days, amounting to $11.88. That was paid by me.

Q. Did you pay the amount of that voucher to Mr. Houser? A. I did. The next voucher is No. 1,947, paid by me, to Thomas Sommerville Company in the amount of $59.64 for a series of items, small items of piping and fittings. There are 8 malleable iron tees and pipe fittings, 600 feet of 1½"

black iron pipe, 100 feet of 1" black iron pipe. And a series of malleable fittings amounting to $58.66, and then there are a couple of other items more, totalling $59.64.

Q. Did you pay the amount of this voucher? A. I did. The object of it is for the Pneumatic Drill Air Compressor Machine for the cutting of the stone under the Graham contract.

This is a voucher pay-roll No. 1,953, in 11 sheets, the total (279) amount of the payroll being $8,165.88.

Q. How much of that amount was charged to Mr. Graham? A. It is a pay roll containing a great many names, but there is one on it, that of John H. Harmise, who was a laborer and who worked on the building under the Graham contract, on account of the Graham contract, for four days at $1.50 per day, total $6.00. That one item in the voucher is chargeable to Mr. Graham.

Q. Will you look at that sheet, and state whether or not it is John H. Heemise or John Diggs, who worked on the Graham contract? A. John Diggs. That is the one. His pay was $8.00. He was a laborer for four days at $2 a day, $8, and this work was performed on account of the Graham contract, and it was signed and receipted for on this payroll.

Q. That was paid? A. It was.

Q. Did you pay it? A. I did. The next voucher is No. 1,954, and it is a payroll in five sheets, all on account of the Graham contract. The total amount of it is $5,291.22; like the previous payrolls paid on the Graham contract, it is a payroll of the employees on that account for the second half of January, 1909. The amounts paid to the various employees are receipted for respectively in the receipt columns. The payroll is certified by me and paid by me.

The next voucher is No. 1,958 paid to Thomas H. Dallett Company, Philadelphia, for further continued rental of the air compressor and air receiver, etc., for $\frac{2}{3}$ of a month, in December 1908, and January 1909, at $60 per month, amounting to $40 net, which was charged to the Graham contract. I paid that voucher.

Voucher No. 1,959, which is a similar voucher to that one just read, and is for the continued use of the air compressor and receiver for $\frac{1}{3}$ of a month in 1909, $20.

The next voucher is Voucher No. 1,963, paid to the National Electrical Supply Company for 1/12 carbon brush for the motor, price 60 cents. This was during the repair of the electric motor used in running the machinery on the Graham contract.

(280) Q. Did you pay the amount of that voucher? A. Yes, I did. This voucher is No. 1,976, paid by me to Johnson

Bros., coal dealers, amount $69.78, for bituminous coal used for blacksmithing in the Graham contract, $38.50, and for 22 tons and a fraction used in operating the machinery, bituminous coal, running the grindstone and motor, etc., $30.84, ½ of which only was charged to the Graham contract, making a net, $41.28, total of the voucher, $69.78.

Q. Did you pay the amount of that voucher? A. I did.

Q. Do you know whether or not the coal mentioned in that voucher was supplied? A. I know we had all the coal we needed to do the work and that it came from that source.

This new voucher is No. 1,989. It is a payroll in four sheets, all on account of the Graham contract amounting to a total of $2,781.92 for the first half of the month of February, 1909. I paid that voucher.

The next voucher is No. 1,992 in the amount of $2.75, paid by me on the Graham account to James H. Lambe Company for six flat bastard files.

Q. Did you pay the amount of that voucher? A. I can not answer specifically as to that little item. The next voucher is No. 1,993 paid to Z. D. Gilman, for a 2 pound can of linoleine, total 54 cents.

Q. What is linoleine? A. I do not know.

Q. You do not know whether or not you received that? A. No, sir.

Q. Did you pay the amount of that voucher? A. I paid the amount of the voucher. This voucher is No. 2,006 paid to George E. Muth Company in the amount of $2.05 for some painting items, orange shellac and white shellac and one gill of denatured alcohol and 12 bottles of cementin, total $2.05 (281). Q. Did you pay the amount of that voucher? A. I did. The next is No. 2,014, paid to the Washington Gas Light Company amounting to $84.80 for coke, furnished on the Graham contract, and the carrying of the same, the cartage, 960 bushels amounting to $84.80. This coke, like all previous coke we referred to, being required for the blacksmith's forges.

Q. Did you pay the amount of that voucher? A. I did. This voucher No. 2,023 paid to Thomas Sommerville Company in the amount of $1.68 for six T. handle stop cocks, 12 black iron nipples and 6 plubs for some repair or extension of the air compressing piping.

Q. Did you pay that? A. I did. The next voucher is No. 2,036, a pay-roll on the Graham contract in three sheets. The payroll is for the services of employees on the Graham account all receipted for individually and certified by myself and is like all the other previous payrolls on the Graham account. The total amount is $1,430.59.

Q. Did you pay that? A. I did. The next voucher is No. 2,055, paid to Thomas H. Dallett Company in the amo-

Q. Can you tell from that voucher what proportion of it was used on the Graham contract? A. I can not say. Let me look at that one more. I know that such a boiler was hired and used on the Graham contract, although it does not appear on the voucher. I remember the circumstance.

Q. Was it expressly used there? Do you know? A. I think it was. I remember the circumstance of hiring that boiler to help out on the work.

Q. The next voucher is No. 2,141. It is a voucher for further rental of the air compressor machinery used on the Graham contract, covering a period of 1/30 of a month, which was four days, out of the month of March, 1909, at $60 per month, the net amount being $8. I paid that.

Q. Did you pay the amount of the other voucher I handed you a moment ago for the boiler? A. I did.

Q. Do you know whether or not the air compressor was (285) used on the work? A. I know it was. The air compressor was on the work in use on account of the Graham contract.

This next voucher is No. 2,122, paid by me to Johnson Brothers in the amount of $21.33 for furnishing coal from March 6th, 1909, to March 19, 1909, 5 and 45/2240 tons amounting to $21.33, which was purchased for the Graham contract.

Q. Was that paid by you? A. It was paid by me. The next voucher is No. 2,142, paid to J. H. Houser, in the amount of $40 for hauling engine from Masonic building to Parson yard, and hauling air compressor to Pennsylvania Railroad freight station and boiler to Fosberg's yard amounting to $40.

Q. When was that work done? A. In March, 1909.

Q. How about the building at that time? A. The work under the Graham contract was finished about that time; that is my recollection, and that was clearing up the grounds and returning the hired outfit for the Graham contract and stopping the expenses upon it.

Q. Was this voucher, the amount of it, paid by you? A. It was. The next voucher is a pay-roll No. 2,144, in two sheets paid on account of the Graham contract and amounting to a total of $205.26, all on the Graham contract, and similar to all previous pay rolls read on this account.

Q. Was it paid by you? A. It was paid by me.

This next voucher is No. 2,156, paid to the Potomac Electric Power Company for electric current used at the building and on the Graham account as follows: The first item in the bill amounts to $122.28—this current was furnished during the months from December, 1908, to March, 1909. This first on is $122.28, $\frac{4}{5}$ of which is charged to the Graham

ing the proportion which was used on his contract, amounting to the $140.76.

The next item on the account was for the general building account, and by another meter; the Potomac Power Company's cable came into the building and was branched to the different works and a separate meter was put on as far as practicable the different parts of the work that were independent of other parts. So, in the first item, the meter which is numbered bears a value of $122.28 and ⅞ of that was charged to Mr. Graham and another meter, the bill from the Power Company contained charges amounting to $958.50, which was all charged to the building, the General building, and none of which was charged to the Graham contract.

The next item is on another meter which came to the office and was not charged to the Graham contract but was charged to the general account of building $9.47; and then the fourth meter, the reading of the fourth meter belonged wholly to the Graham work amounting to $50.37 net. The fourth meter was on the grind-stones, some part of which work was done for the building itself and the reading of the meter was consequently divided proportionately between the two, the General building and Mr. Graham's work on the grind-stones. The total amount of the reading of the meter was $67.16 and ¾ of that amount was charged to the Graham contract, being $50.37, so that out of the total bill which was $1,082.47, only $191.13 was charged to Mr. Graham, as being the part that he was chargeable for. I paid that voucher in that amount.

Q. Do you know whether the current was furnished as set forth in this voucher? A. I cannot testify as to the reading of the meters, but the current was furnished and used.

Q. Can you state what that is that I now hand you and state how it is made up? A. I do not see any number on it. This is a voucher for freight charges from granite quarries in Bethel, Vt., to the South pavilion of the new building for the National Museum. There are various items of carloads of granite, rough granite.

Q. What is the total of that? A. The sum total of it is $7,316.53.

(287) Q. Was that amount paid? A. It was paid to the Philadelphia, Baltimore & Washington Railroad Co. This was freight on the granite transported from the Bethel quarries in Vermont to fulfill the contract of the Graham work and paid accordingly.

Q. Will you state what these papers are that I now hand you? A. These papers relate to and explain the claim of the Philadelphia, Baltimore and Washington Railroad Co. for freight on rough granite, aggregating [illegible]

Q. Do they all relate to that claim? A. They all relate to that claim.

Mr. McLANAHAN: We will offer them in evidence without reading them.

(It is hereby agreed that said original papers referring to said freight voucher may be used before any court at the hearing or in the argument of this case.)

Q. Do you know whether the total amount mentioned in that voucher $7,351.53 has all been paid at the present time? A. Yes—well, I cannot say precisely about that. Let me see the paper.

(Paper handed to the witness.)

A. No, I think not.

Q. Can you tell exactly how much has been paid? A. It was all paid except a difference of $765.60. The account has been gone over but it is a matter of adjustment and settlement through the Auditor's office of the Government. There were various little differences as to the rate, or something like that in the various accounts which made it necessary to be adjusted by the auditor.

The Railroad Company made some claim for freight and it has figured up the claim in this account. When it came to the Auditor's office the Auditor wouldn't allow the whole of it. They had reasons for cutting out certain items as not being properly chargeable to the Government, and as to what extent the account could be discounted in that way by the Government was so much to the benefit of Mr. Graham. The Railroad Company had undertaken—I remember the case now—(288) the settlement of this account for freight, which you see is a very long one and covers a great deal of material, from the Bethel Quarry to Washington, as it had previously been the Bethel quarry to Baltimore during Mr. Graham's continuation of the contract, involving a question on which the Railroad Company made claim of the amount of the freight charged on the little branch Railroad up in Bethel that runs from the quarry down to the main railroad, the Central Vermont Railroad; the Railroad Company charged a rate that was larger than the rate that I had made a bargain for before they undertook the freighting on account of Mr. Graham's contract, and they made their bill for that. I had a bargain myself with the Company, the correspondence of which is there.

Q. When did you make that bargain? A. Before they undertook the freighting on the Government account.

amendment of the contract. I undertook to carry on the work after the amendment of the contract and one of the things to be done, one of the items to be done, was to pay the freight on this granite stock from the Bethel quarry to Washington.

Q. What was to be done by Mr. Graham? A. It was to be done by Mr. Graham, that is his contract called for it to be done from the quarry to Baltimore and then he was to freight it to Washington. It as long as he continued on in the work, the finished stone from Baltimore to Washington. When he stopped the work on his contract, I had to take it up and one of the indispensable items was the getting of the granite to Washington so we could work on it. We have already seen where we replevied and got possession of the Government's stone that remained in his yard when he stopped work on the contract. We got that over to Washington and then, of course, we had to get from the Bethel Quarry all of the rest of the stone required directly from that quarry to Washington, where we were going to cut it. To undertake to do this, I wanted a price fixed because the rate was different from the original one under Mr. Graham's bargain with the Railroad Company. I got bids from two Railroads, the Baltimore & Ohio and the Pennsylvania Railroad in order to get the lowest bid I could and make the contract accordingly. I used the price and bargained with them to bring the stone from Bethel Quarry to Washington at that price, of course, and I do not think I paid anything on that account until nearly all the stone had been freighted down there. When the Railroad Company sent in their account to me they made it out at a different price, just a little larger than the one I agreed upon and I refused of course to pay it at that price. I paid part of it and the rest they put in a claim for, but the claim has never been paid. Further than that, the Comptroller of the Treasury, the Auditor's office and the Comptroller, have ruled that that extra charge was improper and was not payable; therefore, that extra charge has not been paid and is not likely to be paid by Mr. Graham's account.

Q. And that explains that $700 deduction? A. That explains that deduction of $700.

Q. Will you state generally for what all these sums have been paid which you have mentioned in these vouchers?

Mr. HARLEY: Will your Honor let that come in subject to exception?

The COURT: Yes.

The WITNESS: All the

and for the carrying on of the F. F. Graham contract, No. 25, for the National Museum.

Q. You have testified in a number of instances that you were not personally familiar with certain services rendered, or with certain materials furnished. Will you state where you received your information on which you made the payments which you have testified to as to these services being rendered and as to these materials being furnished? A. I received my information through my organization for carrying on the work.

Q. Of what did that organization consist? A. The organization consisted of, first, my chief clerk, Mr. Shelby here, who was at my principal office and in communication all the time and frequently going back and forth to the work at the Museum Building.

Q. Who kept the records of the materials furnished? A. The records of the materials furnished were checked up and (2301) made originally at the building where the materials were delivered, received and counted and weighed and certified to by the Master Mechanic on the construction of the new building for the National Museum Building.

Q. Who was the Master Mechanic? A. Mr. Frederick R. Evans, and also a clerk by the name of —

Q. Who was the clerk? A. Mr. Looker, and also Mr. William Pirie, who was the general foreman and local manager of the stone cutting work and all the work at the Museum building on account of this Graham contract.

Q. As to the time kept, do you know who the timekeepers were that kept those time sheets and attended to that part of it? A. The time was kept by the master foreman on the work, Mr. Pirie, and assisted by a couple foremen of stonecutters there. It was mainly checked up, however, by Mr. Looker. He went around amongst the men two or three times a day, know the men that were on the pay rolls and whether they were there doing their work or not, and it was also under the eye of Mr. Pirie all day long and so in that way, we had positive oversight of the expenditures of money for the time of the workmen and all the employees on the job.

Q. How were reports made to you by these men, if any were made? A. They were made every day, daily, by a system, a similar system to what was going on on the general construction of the Museum Building under me, daily, throughout the whole process of its construction, and this work came right into the same general organization.

Q. Personally, how often did you visit the work yourself? A. Well, almost daily; sometime two or three times a day. It was right there in the City and I was constantly visiting it.

Q. What other duties did you have at this same time? A. Besides the work on that building?

Q. Yes. A. I had charge of the management, care and repair and running of the building for the Library of Congress, and had charge of the Library itself under the law, under the Government, under Congress independently. I am disbursing officer for the Library throughout, not only my department of it, which is the handling of the building, its apparatus, its care and maintenance, entirely independent of the Library, and also the Library itself. I paid all the accounts that are incurred by the Librarian in the handling of the Library and the expenditures under the appropriations for it.

Q. What technical training have you had in the line of construction work? A. Well, I began as a boy.

Q. What technical schools did you go to? A. The Engineering School known as the Lawrence Scientific School of Harvard University.

Q. What degree have you now? A. Bachelor of Science. I took that Civil Engineering course in that school.

Mr. HARLEY: What school is that? A. The Lawrence Scientific School of Harvard College. Entering there in 1861 and leaving in 1863 as a Civil Engineer.

Q. Are you a Civil Engineer? A. I took the Civil Engineering course with the view of becoming a Civil Engineer, which I have tried to be ever since.

Q. Do you belong to any Society of Civil Engineers? A. I am a member of the American Society of Civil Engineers, and have been for some twenty-two years, I believe. I wear a badge for that matter. I have been a director in that Society; I have been vice-president of it; I am still a member. I am a member of a number of other Civil Engineer Societies, and I am president of two of them now, besides the American Society, the Harvard Engineer's Association and the Washington Society of Engineers.

Q. What office do you hold in the Washington Society of Engineers? A. President of it.

Mr. HILL: Your Honor, I have here checks of the United States Treasury, drawn by Mr. Greenon the Treasurer, bearing (299) on the back of each check the receipt of the person receiving it. These checks show every payment that has been made under this contract, except one check for the last voucher which I have not received but will receive tomorrow morning from the Treasury Department. That was paid in a different way, and that will come in later. In the case of every one of these checks, excepting the payroll checks, the person to whom the payment is made receipts on the back of the check. Some

of the payroll checks are for a larger amount than is included in the Graham contract. The payrolls show the receipt of each person who received the money. I wish to shorten the time that the Government's case will take as much as possible, but we have to prove the payment under each of those vouchers. We shall offer these, and if your Honor please, I will, in order to shorten the time, offer the whole lump of vouchers right straight through and refer to several of them, getting Mr. Green to identify his signature on each one of them and have put in the records several of them to show the character of the check, because they are absolute receipts for all of these payments.

(It is hereby agreed that said original checks may be used before any court at the hearing or in the argument of this case.)

Mr. HARLEY: We are willing to admit that Mr. Green would testify that his signature appears to each and every one of those checks, if your Honor please. We are further willing to admit that this endorsement, purporting to be the endorsement of Frank F. Graham, is, in fact, his endorsement.

The COURT: Those checks bearing his endorsement are the checks paid to him before the contract was taken over by the Government.

(293) Mr. HARLEY: I presume so.

The COURT: And some of these are made in payment of the vouchers.

Mr. HILL: In the corner of each check is the object for which it was drawn, salary or for air compressor and all that sort of thing.

Mr. HARLEY: With reference to these checks that my brother holds in his hand, I think all we are called upon to admit, to shorten the case, is that Mr. Green would testify that that is his signature at the foot of each and every one of those drafts, if your Honor please.

Mr. HILL: You will admit that these are all that they purport to be.

Mr. HARLEY: I could not admit that.

The COURT: It is admitted that the amounts of the checks agree with the amounts of the vouchers.

Mr. HARLEY: I do not know that.

Mr. HILL: Except in the pay-roll vouchers and a few other cases.

The COURT: And they have come back with the endorsement on them.

Mr. HILL: I think you will admit those are vouchers drawn—

Mr. HARLEY: Those bearing the endorsement of Mr. Graham are sufficiently out of the way, but as to the others I do not quite catch the suggestion of the court.

The COURT: That they were issued by Mr. Green in payment of the vouchers which he has produced and that they are endorsed and have come back in the hands of the United States Treasurer.

Mr. HARLEY: I think we had better enter into a little stipulation about that. I am perfectly willing to have them come in subject to exception, just as the other vouchers, and be considered in evidence. All that Mr. Green can testify to is that is his signature and that they came back to him, I presume.

The COURT: That he issued them to persons entitled to receive the money and they were paid by the United States (291) Treasurer, and they were presented at the United States Treasury for payment and how they come in the hands of the District Attorney.

Mr. HILL: We will offer all those subject to exception.

Mr. HARLEY: I will admit that those are United States Government checks—is that the right name for them Mr. Green? A. Yes, we call them checks.

Mr. HARLEY: I am willing to admit that those are checks on the Treasury of the United States.

The WITNESS: They are made like a bank check and read the same way.

Mr. HARLEY: And that they were issued by Bernard R. Green, Superintendent of Construction.

Mr. HILL: Will you read one of those checks to the jury and read what is on the back of it and then I will show it to them.

Mr. HARLEY: Of course, we are not admitting the justice of any one of those.

Mr. HILL: Oh, no. All we are offering these for is to show that the money was paid.

Mr. HARLEY: Of course, if there is any disparity between those checks and the vouchers, it is my privilege to show it.

Mr. HILL: Oh, yes.

Q. Kindly read that to the jury.

The COURT: Suppose you read it.

Mr. HILL: Voucher No. 1,051, Building for the National Museum, Washington, D. C., October 10, 1907, then the number of the check, Treasury of the United States, Washington, D. C., pay to the order of Frank F. Graham $3,500.00, down in the corner it says: Object for which drawn, cut granite, signed Bernard R. Green, Superintendent of Construction. Then, upon the back of each one of these checks appears this printed in red letters: "This check must be endorsed on the line below by the person in whose favor it is drawn and the name must be spelled exactly the same as it is on the face of the check; if endorsement is made by mark, it must be witnessed by two persons who can write, giving their place of residence (295) in full." This particular check bears the signature of Frank F. Graham on the back over the words in red, "Sign on this line," and then there are endorsements here to show the course of the check and a punch mark U. S. T. and a number to show the check is paid.

Now, these checks which you have before you show all the payments to Mr. Graham before the contract was abandoned? A. They do.

Q. The rest of those checks under the vouchers which have been presented to you show the payment to the other persons for services and various other things except as I have explained. Here is one check to William Pirie for services and it bears upon its back the name of William Pirie. Just look at them generally and then hand them to the jury in a lump (handing checks to the witness). Here is a photograph show-

ing the rear view of the dome which I will put in evidence with the consent of the other side.

Mr. HARLEY: You know it is correct.

Mr. HILL: Yes, I will have him testify to that. Look at this photograph, Mr. Green, and state what you know it to be. A. This is a photograph of the North side of the South Pavilion of the new National Museum building, of which this is a front view (indicating). This is a rear view of the North side view of the same pavilion; the scene above the roof which adjoins it on the North side.

(It is hereby agreed that said original photograph showing the rear view of said dome may be used before any court at the hearing or in the argument of this case.)

Q. Kindly look at this letter, see if it were received by you, and if so, read it to the jury. A. This letter was received by me and it is dated October 4, 1907, addressed to Bernard R. Green, Esq., Superintendent of Construction, Library of Congress, Washington, D. C., signed by Frank F. Graham. "Dear Sir:—In starting to lay off setting plans for drum wall of dome, I notice a discrepancy between "quarter (296) plan through Triglyphs" on F. S. D.—meaning full sized drawings—No. 166 and the other drawings. The cavity or hollow space in drum wall is figured three feet 10", making outer diameter of drum 84 ft. 0", in all other contract drawings, this space is figured 1' 10" and the outer diameter 80' 0". In this drawing (No. 176) architects call attention to a change of 3" in heighth of Trighlyphs, but make no mention of this more important change. I therefore hope it is an error, otherwise I must ask you for an order for the extra work it will entail. Please let me know what to do in this matter, as I am anxious to finish setting plans as promised. Yours very truly, Frank F. Graham."

Q. How long was that after the making of the contract. A. A little less than a year.

Mr. HARLEY: The contract was made in October, 1906.

Q. (Mr. HILL) What allowance, if any, did you make to Mr. Graham for the widening of the dome therein referred to? A. Why, we figured up finally the several items of allowance, the principal one of which being for this and I agreed with him to allow $4,000 for all these little differences on that point.

Mr. HARLEY: Was the contract in writing? A. Not in writing, not completed.

Q. (Mr. HILL) Look at this letter which I now hand to you and state what it is, please. A. This is a little note signed by Mr. F. F. Graham.

Mr. HARLEY: Do you know whether that is Mr. Graham's signature? A. It is.

Q. You know that is Mr. Graham's signature? A. It looks just like all the rest of them, yes, I identify it.

Mr. HILL: Does my brother contend that it was not written by Mr. Graham?

Mr. HARLEY: It is most assuredly not written by Mr. Graham.

Mr. HILL: Do you contend that it was not written on his behalf?

Mr. HARLEY: I do not know.

(297) Q. (Mr. HILL) Is that the same signature that appears on all the other papers?

Mr. HARLEY: Suppose we let it in subject to exception.

Mr. HILL: We allowed a $4,000 allowance for the extension in the diameter of the dome and we want to show that credit in addition to the contract. It never was made the subject of a formal contract, the formal contract was never signed in reference to it and we have made that $4,000 allowance.

Mr. HARLEY: That is to come in subject to exception, if your Honor please.

The COURT: Yes.

Q. (Mr. HILL) We have offered this in order to show one of the credits made in the account against Mr. Graham. Please read the enclosure in the letter explained to the jury. A. This is a letter dated February 20, 1908, written to me by Mr. Graham, although not signed by him, but signed, apparently, for him. His name is signed to it, but not his signature, although yesterday I thought it was his signature. It reads:

"Enclosed find bill of extras for extra work and stock on the Museum contract. $3,826.10, extra handling and cutting; $1,097.25, extra freight, total $4,923.65. Respt., F. F. Graham."

The enclosed papers are a number of sheets containing the details of this extra claim computed—there are a good many figures in them and I suppose you do not want me to read everything. The first is cost of cutting and handling. D. A. Course, 12-7 by 8 by 2-0, equals 25' 2" that is a table of computation of the number of cubic feet in certain stones of seven courses of the granite—I will have to interpret this and say what it is—we can understand it by our knowledge of the drawings, but I will have to explain that this is a computation of the number of cubic feet of granite in these certain courses of the dome of the building. This goes into the cost of 75 cents a joint. It is the cost of the cutting figured out in detail by (208) courses at so many dollars per course and footing up, $1,040.83.

Q. (Mr. Harley) How much is that? A. This is a progress calculation which at this point amounts to $1,040.83. That is one of the items. I will come to the total in a later sheet. The first two sheets reaches a total computation of $1,040.83. The next sheet contains the estimate of extra work, extra cutting on the dome. That begins with this first figure of $1,040.83, then comes an item of extra cost in course Y. Course "Y" is a course of stone in the cornice of the pavilion in the front, which he computes as worth $140.55. Then he has the next item of extra cutting on column caps, $713.64. Then an item of the same on the pilaster caps at $212.42; then there is a similar extra on course Z 11; that is a course of stone that runs up over the pediment all around on which he estimates an extra charge. It is a course like this (indicating on photograph). He thinks he is there entitled to a little extra allowance on that course amounting to $262.64. Then he finds that thirteen stones in course "U" he should have some extra allowance for and he figures that at $89.70 and also 6 stones in course "U" which he makes an extra of $35.70, being a total after adding all these up of $2,295.18. He adds to that his estimate of ¼ of the amount for the value of the labor on it, and that is, $831.82, making a total of $3,327.30, and on the whole he adds 15 per cent. for profit, making the total amount read in the first item of the letter of $3,826.20. Then on the next sheet he computes the additional cubic feet of stock required by increasing the diameter of the dome from 80 feet to 84 feet, which adds to the circumference of the dome 12 feet 6¾ inches and he calls that 12 feet and 7 inches, and then

he computes the amount of stock, extra stone, required to make this little bit of an extra circumference of the dome—he makes that out 500 feet 2 inches—500 2/12 cubic feet. He then figures out in a computation here that the extra stock in the caps, the column caps, that means 5 caps as there are 8 columns, that those caps because of there being required to be made a little larger to cover the ornamentation there (indicating on photograph) amounts to 626 cubic feet extra stock. (—) Then he treats the pilaster caps in a similar way, there are six of them, and makes an extra amount of stock of 186 cubic feet 4 inches. Then he computes the extra stock in course "Y," at 143 feet 5 inches; the extra stock in course "Z" 11 at 268 feet extra stock and the little panel stones in course "[illegible]" 104 feet 10 inches extra stock, and then he sums up all these little extra items of stock, amounting to 1,828 feet, 9 inches and multiplies it at 60 cents a foot, at which he regards the work worth per foot—no, that is 60 cents per foot freight; this is the freight that we would have to pay on the extra stock that he has been computing here, and that amounts to $1,097.25, which forms the second item in his letter, making a total of $3,826.40 and $1,097.25, and that makes the total amount of his claim $4,923.65, as I first read it.

Q. Please state to the jury whether, upon the basis of that claim, any agreement was made by you with Mr. Graham? A. These items referred to in his estimate which have been somewhat cumulative as the work went on, from time to time, were computed and estimated by Mr. Pirie—

Mr. HARLEY: That is not responsive to the question.

A. I will say, yes.
Q. What was that agreement?

Mr. HARLEY: Was it in writing? A. It was.

Mr. HARLEY: Produce it.

The WITNESS: It is in writing; in correspondence.

Mr. HILL: Go ahead, Mr. Green, and answer the question.

Mr. HARLEY: I submit that he has answered the question. He says that it is in writing and I demand of the Government that they produce the correspondence and the agreement.

Mr. HILL: This is simply an effort on our part to show credit which we have allowed Mr. Graham. If my brother wants to waive that $4,000 extra which we have allowed, we will be very glad to do it.

Q. Was any formal contract ever entered into with reference to those items? A. It was not completed, no.

(300) Q. You have told the jury from the memorandum, but now I wish you to please explain what that list comprises and point out to them the matters contained therein.

The Court: I think the jury understands that pretty well. I understand the principal portion comes from the dome being larger than was mentioned in the specifications.

The Witness: I don't know if that is the principal portion of it or not.

Q. (Mr. Hill) Will you explain to the jury just what this change in the dome was? A. The dome, as you know, of course, is this round top, the central feature of the top of the pavilion on the out-side. This picture shows the front part of it (indicating on photograph) and this is the rear part. It was simply a perfectly circular and -zonometrical cylindrical projection and it is a crown with the spherical dome. That is made of terra cotta (indicating) and covered with slate. It contains no stone. The stone is all in this portion of the building (indicating). That is right here and forms the basis of the terra cotta and slate dome, which rests upon it like the crown of a derby hat. This terra cotta and slate rest on it. It is not involved in any way in this granite contract, but as this (indicating) merges from the top of the adjoining roof, it is faced with granite. That is the granite that was in the contract with Mr. Graham, and the diameter of the dome originally made in the sketches or designs was eighty feet, and it was found necessary in studying out the details and fixing up the details drawings for that granite to increase its diameter to 81 feet. It is a mere trifle in the dimensions of the dome, as you will see. Now, the extra work required to do that was merely to put in each course up the side of the dome more length circumferentially to make up the extra circumference. That is one of the items of the extra stock and cutting to fill that up, and it is a mere bagatelle in this work. Another (301) estimate is some little extra work and some details in adjusting the layout of this course of stone that goes over the four pediments: here is the big front one and it is all alike all the way around. There was a little extra on that and there is a little extra stock and cutting on the caps for these columns here: that is, those ornamental caps and the pilasters which correspond to them inside. There is also a little bit of extra stock to increase slightly about 10 inches from these heavy cornice stones that rest horizontally about the building and project and overhang (indicating on photograph). That was another item. There are two or three other little small trifle

Q. (The COURT) Is there really any dispute about the allowance of this sum for extra work?

Mr. HARLEY: Whether the allowance was complete or not, they have already put in evidence a statement of an unexecuted contract and we want to know *to know* what they mean by it.

Mr. HILL: We can not see what they want us to prove. This is simply an extra allowance to them.

The COURT: Was there a dispute between the contractor and the Superintendent of Construction?

Mr. HILL: No, sir; this was just a lot of little extra things that were to be lumped together at the conclusion of the whole.

Q. (Mr. HILL) Just read this letter Mr. Green. A. This is a letter dated February 29, 1908, written by me to Mr. Graham in answer to his letter of the 20th, which I have just read. It reads:

"Your letter of the 20th instant in the form of a bill "for extras", which appears to be partly a reply to my letter of October 9, 1907, asking your price for doing extra work under your contract for the south pavilion granite of the National Museum building, has been received and considered in connection with the estimates by this office on the same work.

"Your sum total is $4,923.65, while the best that we can make it, allowing you liberally in every item, including the same rate of profit, 15%, adopted for yourself, is $3,852.98. I am willing to increase the latter to a round sum of $4,000—as a compromise, which is all that I, as representing the Gov-
(302) ernment, feel authorized to agree to, and trust you will be willing to sign a supplemental contract in that amount.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Mr. HARLEY: We ask that that go in subject to exception.

Mr. HILL: Why?

Mr. HARLEY: Because it was written by the bookkeeper who is now in the employ of the Government and who is now present as the Government's star witness.

Mr. HILL: We offered that for what it is worth, and if it is a forgery from Mr. Graham's office, we have nothing to do with it.

Mr. HARLEY: Does it come in subject to exception, your Honor?

The COURT: Yes, sir.

Q. (Mr. HARLEY) What is the date of the letter which you say is from Mr. Graham? A. It says March 3rd, 1908. It came to me as most letters did, in the usual way, and was signed by Mr. Graham, and I supposed at the time it was Mr. Graham's signature. It is addressed to me at Washington. It reads as follows:

"Dear Sir:

Relative to your offer of $1,000 for extra work under my contract for the south pavilion granite of the Nat. Museum Bldg. under date of Feb. 29, —08, I accept this offer as payment for this extra work, although it proves a loss of my profit to me.

"The voucher for the extra carving, amounting to $400.31 was sent signed on Monday, and I suppose same was received.

Very respt. Yours,

F. F. GRAHAM."

Q. (Mr. HILL) Look at that signature and please state to the jury how it compares with the signature of other letters (303) received from Mr. Graham? A. It is as near identical as supposed signatures of the same individual are expected to *me*. It is not particularly unlike the many signatures that Mr. Graham is supposed to have made in his own handwriting, such as receipts and vouchers and endorsing checks and what not. This is the usual signature, as I said before, that we received on his correspondence.

Q. (Mr. HILL) The letter says that the voucher for extra carving, amounting to $400.31, was sent signed on Monday. What was that, do you recollect? A. I don't recall exactly. I think we employed him, gave him—or probably, I cannot tell you now just what it was, but employed him for doing a little extra carving on some of the work. He had to do certain carving under his contract.

Q. In your letter of February 29, 1908, you say "and trust you will be willing to sign a supplemental contract in

Q. Why not? A. The contract was drawn up and prepared for signature and sent to Mr. Graham for signature on his part, and it was only a day or two, or very shortly—so shortly that it had hardly time to come back—before he abandoned the contract, went away, disappeared, and we never saw anything of him since until he appeared in court here the other day and the contract has never come back signed or unsigned.

Q. What is this letter (indicating)? A. I wrote this letter to Mr. Graham on May 25, 1909, and it refers to my letter of May 15, 1909, concerning the annulment of the contract.

Mr. HILL: Just one moment. Read this letter.

The WITNESS: I will read the letter dated May 13, 1909, which was written by me on that day to Mr. Graham. It reads:

"Sir:

"On March 18, 1908, your contract, dated October 23, 1906, made with the undersigned under the direction of the Regents of the Smithsonian Institution, on behalf of the United (304) States, for freighting, cutting, and delivering the granite for the south pavilion for the new building for the National Museum, Washington, D. C., was annulled for failure to prosecute the work according to its terms.

"In pursuance of the provisions and requirements of the contract, the work was thereupon and thereafter continued and prosecuted by the United States until completed on April 7, 1909.

"The work has been performed as diligently and as economically as possible but the total cost has exceeded the amount of your contract and supplemental contract agreed to but not fully executed at the time of the annulment, to the extent of $43,125.87.

"The statement of account is as follows:

"Cash payments to you, to March 6, 1908,		$59,400.00
Cost of continuing and finishing the work by the Government,		136,725.87
		$196,125.87
Amount of original contract, $149,000.00		
Amount of supplemental contract agreed to but not executed,	4,000.00	153,000.00
Excess of cost to Government,		$43,125.87

"Under the terms of the contract I hereby, on behalf of the United States, make demand for restitution of the said sum of $13,125.87 expended by the party of the first part in completing the said contract in excess of the price therein stipulated to be paid to the party of the second part for completing the same.

"In the prosecution of the work under the contract by the United States certain tools and other mechanical equipment were necessarily procured and now remain on hand at your disposal when restitution of the excess cost shall have been paid.

Respectfully,

BERNARD R. GREEN,
Superintendent of Construction."

Q. Will you state what that is (indicating)? A. This (indicating) is a postmaster's receipt for a registered letter sent to Mr. Graham's. The date of the letter is May 13, 1909. This is the receipt for the letter, obtained by me from the post-(305) office after it registration, and it was sent May 13, 1909, by myself and addressed to Mr. Frank F. Graham in Baltimore, and attached to the same letter is the return post-office delivery card dated May 14, 1909.

Q. Whose signature as receipting appears on there? A. Mr. Graham's. That looks as much like his own signature as anything I have ever seen. It is in pencil in the usual way.

Q. Was any notice or copy of that letter to Mr. Graham sent to the defendant surety company by you? A. It was. I have it here, a letter dated May 13, 1909, to the Title Guaranty & Surety Company, Colorado Building, Washington, D. C. I will read it:

"Gentlemen:

"I enclose herewith for your information copy of my letter of this date to Frank F. Graham, of Baltimore, Maryland, concerning the annulment of his contract of October 23, 1906, for cut granite for the south pavilion of the new National Museum building on which you are the sureties, and the prosecution and completion thereof by the United States.

"Respectfully,

BERNARD R. GREEN,
Superintendent of Construction."

The paper which I enclosed was the one previously read which was the letter to Mr. Graham.

Q. Now, read that letter (indicating). A. I will now read the letter which I wrote to Mr. Graham on May 25, 1909. (Reading)

"Sir:

Referring to my letter of May 13, 1909, concerning the annulment of your contract of October 23, 1906, made with the undersigned under the direction of the Regents of the Smithsonian Institution, on behalf of the United States, for freighting, cutting and delivering granite for the south pavilion of the new building for the National Museum, Washington, D. C., and demanding restitution of the sum of $43,125.87 by the party of the first part in excess of the price stipulated to
(306) be paid by the party of the second part for completing the same, I have to state that, through a clerical error of summation of the items, the said sum is incorrectly stated and that the correct sum is $56,080.75.

"The said demand for restitution is therefore hereby increased from the sum of $43,125.87 to $56,080.75.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction."

That letter was also sent by registered mail and the registration receipt came back through the postoffice under date of May 26, 1909, signed in pencil Frank F. Graham, evidently his own personal signature.

(The letters referred to and the postoffice receipts were then shown to the jury by Mr. Hill.)

(It is hereby agreed that said original postoffice receipts may be used before any court in the argument or at the hearing of this case.)

The WITNESS: I will now read a letter which I write to the Title Guaranty & Surety Company under date of May 27, the same date that I write the letter which I have read, to Mr. Graham. This letter reads as follows:

"Gentlemen:

I enclose herewith, for your information, copy of a letter of this date to Frank F. Graham, Baltimore, Maryland, con-

cerning the annulment of his contract of October 23, 1906, on which you are the sureties, and amending my letter of May 13, 1909, to the said Graham in correction of an error of summation of the items of expenditure covering the account, by which the demand for restitution of the excess to the Government in the completion of said contract is increased from $43,125.87 to $56,080.75."

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

The letter enclosed was a copy of the one I previously read. I will read now the letter received by me from Mr. Philip Walker, attorney of the Title Guaranty & Surety Company.

(307) Mr. HARLEY: You did not read the statement enclosed in the letter of May 25.

Mr. HILL: There was none.

Mr. HARLEY: This was enclosed in that letter (handing paper to Mr. Hill.)

Mr. HILL: I don't think that was enclosed. We will put that in later. Read this letter, please.

A. This is the letter which I received from Mr. Philip Walker, the attorney of the Title Guaranty & Surety Company. It is dated May 27, 1909, and reads as follows:

"Dear sir:

"I have to acknowledge receipt of your letter of yesterday, enclosing further statement of claim against Frank E. Graham, which has been forwarded to our Home office, at Scranton, for their consideration.

Yours very truly,

THE TITLE GUARANTY & SURETY COMPANY,
By PHILIP WALKER, Attorney.

Q. Mr. Green, in your letter to Mr. Graham of May 13, 1909, a copy of which you have testified that you mailed to the surety company on May 13, 1909, you set forth the amount of the claim against the defendants as $43,125.87. In your letter of May 25, 1909, to Mr. Graham a copy of which, you have testified, on May 25, 1909, was mailed to the Surety Company, you say that in your former letter there was an error of summation of the items in the other account. Tell us how that error occurred? A. The error occurred in the work of a new clerk in my office in adding up a long series of items composing these expenditures. It was simply a matter of adding up the columns of figures and we did not find it until a day or two afterwards, when my chief clerk, in following it up, found the mistake, and we then made the corrections.

Q. Why did you suppose that the claim was correct when (308) the amount was so much smaller? A. Because I thought the clerical work had been properly done. It was simply a matter of addition.

Q. In your letter of May 25, to Mr. Graham, a copy of which was sent to the Surety Company and acknowledged by them, you say: "The said demand for restitution is therefore hereby increased from the sum of $43,125.87 to $56,080.75." Kindly state how you arrived at that amount? A. Simply by adding up the various items in the account from the beginning to the end, which are in the books in my office the same as on the voucher.

Q. Are those the same items that were presented here in court? A. Yes, sir; they were presented here yesterday by the actual vouchers by which the amounts were paid.

Q. Can you state more particularly to the jury the items of this account? A. The account was made up by—the items of the account consisted of those read yesterday from the various vouchers for material purchased, freight paid and what not, in carrying out the work, and also—

Q. If you have prepared any statement of that, please read it.

Mr. HARLEY: One moment. Let us see the statement first.

The COURT: Do you want him to read every item in the account?

Mr. HILL: Oh, nor sir, just state to the jury what credits were made to Mr. Graham in addition to any which you may have already stated (handing paper to witness.)

Mr. HARLEY: What paper is that which you are looking at, Mr. Green?

The WITNESS: It is simply a statement of the account.

Q. (Mr. HARLEY) Made up by the District Attorney's office A. No, sir; it was made up in my office under my direction. The charge is $56,080.75—

Mr. HARLEY: Is this to come in subject to exception also?

The COURT: Yes, sir.

The WITNESS: I can state that this account of $56,080.75 (309) was naturally made up first by putting down the amount of the Graham contract, $149,000, and then adding to that $4,000., which we thought he was entitled to under the supplemental contract which had not been signed, and then on making up the opposite side of the account, the amount of money paid to Mr. Graham for his part of the work and adding to that the amount of expenditures that we had been subjected to in carrying out his contract after the abandonment of it, and then allowing his various little credits that in the process of that work we had come to. The account is made up in that way and amounts to $56,080.75.

Q. (Mr. HILL) Who did the work under that $4,000 agreement? Did Mr. Graham do it all? A. No, he did not. He did not sign the contract and there was some to be done after he abandoned it, but the several items making up the whole estimate according to the letter which I just read to you were agreed to in lump at an amount of $4,000 so as to cover all the claims he had and adjusting all the little extras that had arisen up to that time, and it was agreed to be settled at a total of $4,000. There were some things in that amount of $4,000 that had not let been completed. They were carried on and completed by the Government after the annulment of the contract.

Q. What other allowances besides the $4,000 allowance were made? A. Why there was an allowance—that is an outstanding allowance of $765.60 which is the amount disallowed by the Government authorities outside of my office on the bill of freight which I read here yesterday from the Pennsylvania Railroad Company, that is, freight on the stock from Bethel to Washington. Then there were a number of other little credits. This other one is hardly a credit, it may be subject

to litigation in the future before the Court of Claims. That would be a matter between the railroad company and the Government, which at the present does not charge Mr. Graham, but it has not been paid and it seems to me that it never will be, because I do not think the Court of Claims will allow it, and the first allowance is in this contract of $1,000. There is another little allowance made after the Government took hold of the work of $1,385.60 allowed them for extra cutting on (510) the column and pilaster cap in the rough. It is a question always in such work where the contractor furnishing the rough cut ready for carving shall stop as between the one kind of work and the other. It is all a matter of judgment and no man will judge it alike. It may be a matter of several hundred dollars or a thousand dollars. That is, the taking of the big rough block and undertaking to rough it down to the point where the carver, who gets $5 a day instead of $3.60 a day, can take it and begin his work. Now, when you draw the line it is a matter of judgment between the contractor and the other. We concluded that some extra cutting for bringing these particular stones down ready for carving as we required, was hardly fair to charge to Mr. Graham, and therefore we credited him with this $1,385.60. There was another item of 300 feet, 5/8 inch steel hoisting cable which we purchased for the Graham contract and we bought it back from them and paid them 6 cents a foot, which amounted to $18. Then we took one grindstone over to the building and allowed him the cost of that at the rate of $22.06. Another little item was labor on cutting Jersey pink granite. We had some ornamental granite there used in another item, and that was allowed for at $21.50. Another item was the cutting of raglets for the Southern pavilion that is a groove in which the copper flashing for the waterproofing is run in the stone. All those amounted to $1,505.70 and we credited him with that. Then there are two other little items here of Virginia pine lumber 2,400 feet in one item and 760 feet in the other, which we bought back and allowed him the amount at half price for second hand lumber; we credited him with the value $29.64. And another item of Virginia pine about a month later which was used on his contract, was allowed at the same rate, 4,302 feet Virginia pine, amounting to $40.35. We also allowed some little items of plumbing supplies used by the Government after the completion of the contract, 613 feet of black iron pipe and some fittings, a few cents's worth, and we took that back and allowed him what was originally paid for it on his account. The total amount of these items is $7,042.90. That was a credit, and by putting in these various credits the total amount is made up.

Q. What is the amount now due and owing, if any, to (311) the plaintiff?

Mr. HARLEY: Objected to.

The COURT: You can ask him by the account as he made it up.

Q. (Mr. HILL) According to the account, how much is owing?

Mr. HARLEY: That is, according to the account which Mr. Green has made up.

A. $56,080.75.

Q. Is there any further credit allowance on the amount you just testified to? A. $765.60 which I read a moment ago as being withdrawn because the money was not paid. It was disallowed by the Government in an account charged against the Graham contract for the freighting of the granite by the Pennsylvania Railroad Company. That portion of their bill was disallowed and is therefore withdrawn from the charge against Mr. Graham.

Q. (The COURT) Did you allow credit or deduct it from the charges A. We deducted it from the charge.

Q. Then you have not charged him with that? A. No, sir. That would be thrashed out in the Court of Claims.

Q. The Railroad Company has sued the Government for that charge? A. No, sir; I don't think they have.

Q. Well, they have threatened to do so? A. They have threatened to, but it was not allowed and not paid by the Government.

Mr. HILL: If the court please, I ask permission to withdraw Mr. Green for a moment and introduce in evidence a treasury warrant. There is a witness here whom I wish to let go as soon as possible.

(Examination suspended.)

HENRY KAUFMAN, a witness of full age, having been duly sworn, testified as follows:

Mr. HILL: We offer in evidence, your Honor, the papers in reference to the claim of the Pennsylvania Railroad settled by the auditor June 3, 1909, per settlement No. 2,529.

(It is hereby agreed that the original papers here referred to may be used before any court in the argument or at (312) the hearing of this case.)

Mr. HARLEY: We would like to have it understood that it goes in subject to exception.

The COURT: Very well.

Mr. HILL: This is marked paid June 28, 1909. W. T. No. 6,635.

Q. Please state where you are employed? A. At the United States Sub-Treasury, Baltimore, Maryland.

Q. Please state what that paper which you hold in your hand is? A. It is the treasury settlement warrant No. 6,635, dated June 28, 1909, and drawn to the order of the Philadelphia, Baltimore & Washington Railroad Company for $6,585.93.

Q. Please read the whole warrant with the endorsement.

Mr. HARLEY: What was the date of that?

Mr. HILL: June 28, 1909. I would like to explain that this last item shows here as $7,351.53. That is the total amount of the voucher offered in evidence. But after we beat the railroad company out of this $753, although that is still a question between the railroad company and United States, we allowed that to Mr. Graham as a credit, and this check here shows that payment of that amount.

Mr. HARLEY: Is the District Attorney testifying to the Jury?

Mr. HILL: I thought you wanted that explained.

Mr. HARLEY: No, I object to your explaining anything except in your argument to the jury.

Mr. HILL: Please read the last question.

The COURT: All the District Attorney said was that the voucher, if you add that $753 would amount to $7,351.53. The jury can see that but I think it is the duty of the District Attorney to explain that and not to leave the jury in a foggy (313) condition of mind about it.

A. (reading), "United States Treasury Department, Treasury Settlement Warrant No. 6,635. Washington, D. C., January 28, 1909. Pay to Philadelphia, Baltimore & Washington Railroad Company, or order, $6,585.93. The Assistant Treasurer United States, Philadelphia, will pay this warrant. C. D. Norton, Assistant Treasurer, R. J. Tracewell, Comptroller. G. C. Bantz, Assistant Treasurer," and the chief clerk's name is indistinct; I can not make it out. The postoffice address is care John S. Donaldson, Auditor, Philadelphia, Pennsylvania. It is endorsed "Pay to the order of the Pennsylvania Railroad Company, Philadelphia, Baltimore and Washington Railroad, G. Connors" or "Conns", whatever the name may be I can not make it out.

(The COURT)

Q. How does that get in your hands A. The Treasury
(314) Department in Washington mailed it to us yesterday and we received it this morning. That warrant was paid in Philadelphia, Penna. It shows that on the face of the warrant, paid on February 24, 1910. It is further endorsed "Pay to the order of Philadelphia National Bank, Pennsylvania Railroad Company, J. F. Fahnestock, Treasurer."

The COURT: The important this now is, have you credited Graham with the amount?

Mr. HILL: There is the credit of that sum there, gentlemen of the jury, (indicating).

BERNARD R. GREEN, resumed the stand for a continuation of direct examination and testified as follows:

Mr. HILL: Your Honor, we have no more questions to ask Mr. Green at this stage.

CROSS EXAMINATION.

Q. (Mr. HARLEY) Mr. Green, the quarrying was done where, if you please? A. At the quarry of the Ellis Granite Company, I think, they call themselves; it is located in the town of Bethel, Vermont, at any rate it is located about three or four miles from Bethel Railroad station on the Central Vermont Railroad.

Q. Who owns or who did own these quarries at the time

Q. Who did the quarrying for the Government, please? A. The Thompson-Starrett Company took the granite out of those quarries for the Government under contract.

Q. The Thompson-Starrett Company was your representative at the quarries, the people with whom you have your contract, was it not? A. I can not answer such a question (315) because it is practically two questions. I don't know what sort of an answer you want me to make. I will state what the situation was, if you want that.

Q. You say the Ellis Granite Company owns the quarry? A. Yes, sir.

Q. Who had absolute charge of that quarry at that time? A. I don't know how they managed that.

Q. You had your contract with the Thompson-Starrett Company to furnish you the granite from that quarry, did you not, sir? A. Yes, sir.

Q. And the quarrying was done by the Thompson-Starrett Company for the Government? A. Understood to be. They furnished the stone, or somebody did, under the Thompson-Starrett contract.

Q. Furnished not only the granite called for under the Graham contract but other granite under the Government's work on the Museum, is that correct? A. That is correct.

Q. Where was the cutting done?

The WITNESS: What cutting?

Mr. HARLEY: The cutting of the stones, if you please, sir.

The WITNESS: What stones—I don't understand the question.

Q. Where was the stone under the Graham contract to be cut, if you please, sir?

The COURT: The cutting for the Graham contract?

Mr. HARLEY: Yes, sir.

A. It was to be cut by Mr. Graham.

Q. Where? A. Anywhere he pleased.

Q. As a matter of fact, where did he start in to cut it?

A. At his supposed yards in Baltimore, Maryland.

Q. Those quarries were [illegible]

Q. Were they, as a matter of fact, in the town of Bethel? A. I don't know.

Q. Have you ever been there? A. I have.

Q. Don't you know that the quarries are several miles distant from the town of Bethel? A. I don't know where the town of Bethel is, exactly, but I already said that they were about three or four miles from the railroad station which is known as the Bethel Station on the Central Vermont Railroad in the State of Vermont.

Q. Was that farther or nearer to Baltimore?

The WITNESS: Was what?

Q. Did that make the distance nearer to Baltimore or farther from Baltimore, that three miles, which you allude to? A. It made it farther as travelled by the railroad.

Q. As the stone had to come? A. Yes, sir.

Q. How was the stone gotten from the quarry to the station at Bethel, Vermont, please? A. I think most of it was taken over a railroad—do you mean this stone for the Graham contract?

Q. Yes, we are talking of that and that only? A. Yes, sir.

Q. What is the name of that railroad, please sir. A. I don't know.

Q. Do you know who owns it? A. I do not.

Q. Do you know when it was built? A. Yes, sir, about.

Q. When, sir, please? A. Well, it was built—extended (317) over a considerable time in the construction, probably a couple of years, it may have been, before they began to quarry the stone for this Graham contract.

Q. And this contract was made in October, 1906, and you would say that little railroad had been in operation about two years before that time? A. I think so. Sometime before, at any rate.

Q. Mr. Green, the proposals and contracts have been offered in evidence. Will you be good enough to take them and direct my attention to those parts which relate to the setting plans, please, sir?

The WITNESS: The setting plans?

Mr. HARLEY: Yes, if you please.

The COURT: Is that Article 9 of the specifications?

Q. You framed the proposals, did you not, Mr. Green? A. I did.

Q. And you framed the contract? A. Yes, sir.

Q. You framed the bond and all those papers, did you not, sir? A. I did, practically. They were done under my direction and largely by myself.

Q. It was all done by the Government? A. Yes, sir.

Q. Now, I ask you will you please invite our attention to any parts of those papers referring to the setting plans, if you please, sir? A. It is mainly in paragraph 9 of the specifications of this paper.

Q. Paragraph 9 of the specifications. That is all there is in there about the setting plans?

The WITNESS: Let me look at it again. I don't think there is anything else. No, paragraph 10 continues the subject.

Q. Paragraph 10 refers to the copies, does it not sir? A. (318) Yes, sir; but that relates to setting plans.

Q. Now, is there anything else but paragraph 9 or 10 of the specifications which in any way refers to the setting plans? A. I find nothing else in the specifications.

Q. Now, Section 9 is as follows: "The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every seperate stone in the work. These plans shall be tracings at ½ inch to the foot scale, prepared, lettered and numbered as may be directed by the Superintendent of Construction". That is you, is it not? A. Yes, sir.

Q. (Reading) "And submitted to him not less than one month prior to the commencement of the work on the cutting of the stone they represent." Now, will you tell the gentlemen of the jury—

Mr. HILL: Read the rest of it, Mr. Harley?

Mr. HARLEY: I am going to stop right there and frame my question.

Q. Now, I want to ask you, Mr. Green, which of these setting plans which have been offered in evidence was not submitted to you at least one month prior to the commencement of the work on the cutting of the stone they represent? A. I can not say. I don't know the time that

Q. Show me in section 9 where the word "quarrying" is mentioned, if you please. A. It is not mentioned anywhere in that section.

Now, it goes on further to say: "to give ample time for examination and approval. The setting plans for the lower courses of the basement story (the first courses to be cut) must be prepared and submitted immediately after execution of the contract." Now paragraph 10 refers to copies, does it (319) not, blue or white prints? A. Yes.

Q. Now, let us take these drawings were these setting plans absolutely necessary for the quarry people before they could go on with the work? A. I think so.

Q. Absolutely necessary? A. I think so.

Q. Why didn't you say so upon direct examination then?

The WITNESS: Upon what?

Mr. HARLEY: I ask you why you didn't say that upon direct examination?

A. I don't know what I did say. I answered all the questions the best I could.

Q. You now insist that they are absolutely necessary, but when the District Attorney asked you, page 94, as to the full sized details, are the full sized details absolutely necessary—

Mr HILL: Now you are asking about setting plans and you are reading testimony about full sized details.

Q. You say the setting plans are absolutely necessary for the quarry people? A. I did not say so. I said I thought they were.

Q. You said you think they are absolutely necessary? A. Yes, sir.

Q. How could they tell the size of the stones without the setting plans? A. Well, they might find that out in some other way without the setting plans. We might send them a schedule. There are various ways to get at dimensions.

Q. Are the sizes of the stones shown in the drawings? A. No, sir; only in the details.

Q. Are the detail drawings necessary before the people can go on with the quarrying? A. I think not. They are (320) hardly necessary.

Q. Let us go on and find out where. You were writing continuously about the delays in the making of the setting plans, weren't you? Is not that correct? A. Not continuously.

Q. But you did make complaint and you now make complant that there was unnecessary delay in furnishing you with the setting plans? A. Yes, sir.

Q. But at the same time you say it was necessary on some instances for them to have detail drawings before they could make the setting plans, is that true? A. Yes, sir.

Q. I hand you the letter dated November 9, 1906. I ask you whose signature that is? A. That is the signature of my chief clerk.

Q. Mr. Sheehy? A. Yes, sir.

Q. And it emanated from your office? A. Yes, sir.

Mr. Harley: I offer this in evidence.

Mr. Hill: Please read it.

Mr. Harley: I will read the letter of November 9, 1906. (Reading):

"Sir:

For use in connection with your contract for the granite work for the south pavilion of the National Museum building, the following full size details are sent you by this mail, in a separate package:

#165 Elevation of frieze.
Elevation of dentil course.
Section through main cornice.
(321) #166 Cornice of portico.
#167 Columns.
#168 Pilasters.
Section through sill, window in return.

Please work up as rapidly as possible your setting plans, especially those for the lower part of the work, and submit them to me for checking by the Architects and my approval.

Yours very respectfully,

Q. That is your letter? A. Yes, sir; I think so.

Q. There is no way that Mr. Graham could go ahead intelligently with that setting plan No. 1 before the receipt of these detailed drawings, was there? A. I think he could.

Q. You think he could safely and intelligently go ahead—A. Yes, with some of the plans.

Q. With No. 1, if you please. I want to ask you whether Mr. Graham could prepare with intelligence and safety this setting plan No. 1 before he received those detail drawings referred to in that letter? A. I think not; no, sir.

Q. Then, that in the natural course of events would arrive in Baltimore on the 10th of November, 1906. Now, Mr. Green, you have stated in your testimony, page 57, referring to this setting plan No. 1, "as far as I can make out that was received December 8, 1906, from Mr. Graham." Now, look at that plan again, and see whether you have not made some mistake. You told the jury that as far as you could make out that was received December 8, 1906. Is that correct? A. I don't know; it is a rather faded stamp here.

Q. What is the date marked on there—that (indicating) (322) is the draughtsman's date, that is November 20, is it not? A. Yes, sir; November 20, 1906.

Q. Now, gentlemen, I have the letter of November 27, 1906. Will you look at this, Mr. Green, and state whose signature that is? A. My signature.

Q. You wrote that to Mr. Graham? A. I did.

Mr. Harley: I offer it in evidence and I will read it to the jury. (Reading):

"Sir:

I return herewith, in separate roll, your setting drawing No. 1 of the south pavilion stonework of the National Museum building, the same having been checked up in black pencil by the architects.

Please go over the figures carefully and make the necessary changes unless you misunderstand them in any particular, in which case please submit the matter to this office.

Yours very respectfully,

Q. Well, don't you know that you have, when on November 27 you are returning the setting plan No. 1 already examined and checked up by you? You sent this letter, didn't you, Mr. Green?

The COURT: He said he did.

A. I did.

Q. At the time you sent it you enclosed setting plan No. 1 properly checked up as you there state, did you not? A. I think so, the letter reads that way.

Q. So Mr. Graham got the detailed plans on November 10, and he sent you the setting plan No. 1 time enough for you to begin it and return it on November 19?

Mr. GAITHER: November 27.

(323) Mr. HARLEY: Yes, November 27. I beg your pardon.

A. Yes, sir; the letter reads that way.

Q. And you know that the letter is correct? A. Yes, sir; I don't remember all letters; but I take that letter to be correct.

Q. You were wrong, then, when you said December 8 was the day you received it?

Mr. MCLANAHAN: No, sir; I beg your pardon.

The WITNESS: No, sir; I was not wrong. I was depending upon the stamps on the drawing.

Q. You said on page 57, as far as I can make out, that it was received December 8, 1906. You now say it was originally received much before that time, don't you?

The COURT: November 27?

Mr. HARLEY: No, we will show it was mailed November 20. We got it on November 10 and it was mailed back on November 26.

The WITNESS: Let me get over to the light and try my eye on this stamp which is very faded. I had to try to read it the best I could. I think it is December 8. It is badly faded; but it still looks to me like December 8.

should have reached Baltimore on the 28th of November, I believe, sir?

Mr. Hill: You have given us the wrong date. Your copy shows November 29, but the original letter shows 30.

Mr. Harley: I beg your pardon; that should be corrected.

Q. Look at this letter and state if you received that letter from Mr. Graham. A. I did.

Mr. Harley: I offer this in evidence, if your Honor please. (Reading):

"Dear Sir:

I herewith return in separate roll the setting plans of Courses A, B and C for the South Pavilion National Museum—having made the corrections and changes shown in black pencil by the architects, except in east and west outside walls of portico, in these walls the dimensions adopted by the architects are in fractions of 1/8" 1/8" and 1/12" for instance in Course C. (I mention this because it is the only course in these walls that the corrected dimensions tally with the dimension figured on the drawings 16'-3") the three dimensions are 5' 6 3/8"— 5' 4 1/8" and 5' 4 16". When the joints 3/16" thick are deducted from these dimensions it will leave the net size of stones respectively 5' 6 55/96"—5' 3 47/48" and 5 4 7/96". These dimensions would not be understood by stonecutters, nor could they be accurately cut in granite or easily measured by the average Inspector. I have therefore used the usual fractions of 1/8" 1/8" 1/16" and the dimensions I have figured will not vary from the architects more than 1/48" in any stone, and will save us an infinite amount of trouble. I trust the architects will allow these figures to remain and not think me presumptious in making the change. Most of the other corrections were owing to our not having the details for the bases marked on the plan. Will you please ask the architects to send these as soon as conveniently possible?

Yours very truly,

FRANK E. GRAHAM."

Q. November 30, and it was received by you when? A. December 1st.

Mr. HILL: Whose signature is that offered as?

Mr. HARLEY: I am not testifying, if you object to that letter you can note your objection.

Mr. HILL: Well, we ask whose signature it is. We do not deny that we received that letter; but we want to know who wrote it.

Mr. MCLANAHAN: We ask that come in subject to exception.

Mr. HARLEY: That is satisfactory to us.

Q. He says here that he had not the details for the bases (325) marked on the plan. Do you know when they were sent to him A. I don't remember.

Q. We have shown that you mailed that to Mr. Green on the 27th and that he would get it on the 28th and he sent it back to you on the 30th. There is no great delay about that, is there? A. Probably not.

Q. Would you call it an unreasonable delay? A. No.

Q. Would you call it any delay whatever? Q. From November 28th to the 30th you would call it a delay? A. to a slight extent, yes.

Q. You do not think it is prompt? A. I think I do.

Q. I say you do not think two days is prompt? A. No.

Q. Look at the letter which I now hand you and state whose signature it is? A. Mine.

Q. You mailed it to Mr. Green? A. To Mr. Graham.

Mr. HARLEY: I mean to Mr. Graham.

The WITNESS: All right, sir.

Mr. HARLEY: I offer this letter in evidence. (Reading):

"Atlanta, Georgia, December 10, 1906.

"Dear Mr. Graham:

stead of the two courses shown in the drawing. The idea is that the thin top piece (only about eight inches) will be in danger of being cracked under the column pressure; because of the uncertainty of giving it a very uniform bedding in the setting. I am writing also to Thompson-Starrett to ask them to quarry (326) the blocks accordingly.

Yours truly,

BERNARD R. GREEN."

What setting plan does that letter refer to please, sir? A. I don't know the number of it. I can tell you by looking at the plan.

Q. Now, I want to show you setting plan No. 2. Is that the setting plan referred to in your letter of December 10, 1906?

The WITNESS: Referring to the column bases?

Mr. HARLEY: Yes, refers to the bases or plinths of the eight big columns of the Museum?

A. Yes, sir; that is the plan.

(Plans referred to were then shown to the jury.)

Q. Now, those are the big columns which you referred to, the eight big columns? A. Yes, sir.

Q. When did you receive that setting plan, if you please, sir, from Mr. Graham? A. Received this on December 4.

Q. And then the next time you received it? A. On December 18.

Q. On December 18 you received it? A. Yes, sir. I read the stamp.

Q. And now this letter was mailed in Atlanta on or about December 10? A. Yes, sir.

Q. It could not have reached Baltimore until about the 12th, could it? A. I think not.

Q. And this had been to your office and was sent back and returned to you by Mr. Graham by the 18th? [illegible]

there is anyway Mr. Graham could have completed that setting plan No. 2 before he received your letter of December 10, 1906? Will you tell me how he could fix the subject matter of this letter before he got the letter, if you please, sir? A. No change was needed on this plan to conform to the request in that letter.

Q. Was any change on any plan necessary? A. I don't think there was any; no, sir.

Q. Wasn't the change made? A. Yes, sir.

Q. Wasn't it made on those plans? A. Yes, sir; that is the change in stone.

Q. The change in stone which you authorized in your letter of December 10, and was made on that setting plan No. 2? Will you tell me how that change could be made before Mr. Graham received that letter? A. There was no change in the plan required.

Q. But I want you to tell the jury how that change could have been made by Mr. Graham prior to receiving the letter? A. That is not a change of the plan but a change in the stone.

Q. Doesn't this plan show each and every stone? A. Yes, sir.

Q. Just as it was cut? A. No.

Q. Doesn't each of the setting plans show each and every stone just as it is cut? A. No, sir; it does not.

Q. What is the object of the setting plan? A. To show sufficiently what the stone is to be so that it may be cut.

Q. Will you explain to the jury what you mean by that? You say it shows how it is to be cut but it does not show how it is cut? A. It does show how it is cut.

Q. Then you were wrong when you stated before that it did not show that; is that true? A. I say it is true and it is not true, just as you choose to look at it. The drawings taken in connection with each other and with the specifications and (328) all, show the contractor how it is required to be.

Q. What is the use of the setting plan, then? A. To furnish part of that information.

Q. Is not that the final part of the information? A. All taken together, it is.

Q. Is not the setting plan, Mr. Green, the final part of that information? A. Not the whole of it?

Q. Why do you approve it, then? A. For its purpose.

Q. What purpose? A. As a part of the information by which the contractor performs his work.

Q. Do you mean to say that [illegible]

Q. Could they cut a stone until they have a plan to make the diagram from it? A. They can, some stones.

Q. Do they do it? A. It is not the usual practice.

Q. You know it would be very improper to do so? A. No, sir.

Q. Doesn't this show the size and form of each and every stone? A. No, sir; it does not show all about it.

Q. Doesn't it show the size and form Mr. Green? A. Only by interpretation.

Q. Is there any difficulty in telling from that drawing there (indicating) the size and the shape of that stone? A. (629) Yes, sir.

Q. What is the difficulty, please? A. That represents one of the top stones of the several that go to complete one of the columns. The column is a fluted column, as indicated by one of the other pieces on the plan and is indicated in the general plan from which these plans are made up and which are part of the contract.

Q. Is it not true that the stone cutter takes this setting plan and that from that a diagram is prepared for each and every stone? A. Diagram is made, yes, sir.

Q. And is not the diagram made solely and exclusively from that setting plan? A. No, sir.

Q. What else does the man who makes the diagram use? A. He follows out the general plans and specifications.

Q. Show me in these specifications anything that tells you about the form and size of these stones mentioned in setting plan No. 32? A. The specifications begin by a reference to the drawing.

Q. Lets limit it to these stones here. Now, I want you to show me something in those specifications that refer specifically to any one of those stones on this setting plan? A. Paragraph 22 described the qualities of the cutting required.

Q. Where is that? A. Paragraph 22.

Q. Let me read it?

The WITNESS: No, let me finish my answer first. You might read all sorts of things out of here—

Mr. HARLEY: I think the great difficulty is that you will not find anything there referring to any one stone?

No. 174. South elevation main entrance.

Part elevation or door head and jamb.

No. 175. Full size detail of rake moulding of pediment.

Yours very respectfully,

JOHN Q. SHEEHY,
Chief Clerk."

Q. Now, he refers to the drawing which you have in your hand, setting plan No. 1, and the one which I now hand you, No. 2, is that right, and also to No. 3, asking you to make certain corrections. Those are the three to which he refers to in this letter? A. Yes, sir.

Q. And he asks that certain changes should be made in those drawings does he not, sir?

Mr. HILL: He says "corrections" in the letter but not here.

The WITNESS: I said corrections, some little matters of a fraction of an inch were referred to.

Q. So that is a change brought about by your own office, is it not? A. Yes, sir; those little fractions—

Q. Changes which your own office wished? A. Yes, sir. (333) Q. Now, I have the letter of December 21, 1906. It is addressed to Frank F. Graham. That is also (indicating) signed by your Chief Clerk? A. Yes, sir.

Mr. HARLEY: I will read this letter (reading): "Sir: The tracings of setting plans Nos. 1, 2 and 3 of the granite work of the south pavilion of the National Museum building under your contract for the cutting, received from you a day or two ago, have been checked over by the architects and such corrections as were found necessary have been made. The drawings are now returned to you approved, in a separate roll, and a set of blue prints have been sent to the contractor for the stock, requesting very early shipments of the rough stone to you.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of

Q. This came from your office? A. Yes, sir.

Q. And you were still absent from your office? A. Yes, sir.

Q. That was the date of the approval of these first three setting plans, the last changes which were ordered by you. Now take the first setting plans and I will ask you when you delivered all that stone to Mr. Graham A. I don't know when it was all delivered.

Q. Don't you know as a matter of fact that all the stone under the first setting plan approved by you December 21, 1906, was not delivered until October, 1907? A. I don't know just when the last stone pertaining to that setting plan was delivered.

Q. Don't you know it was in the fall of 1907? A. I don't know.

Q. While you are complaining all the time about setting (334) plans, you don't know whether the stone for a certain setting plan approved December 21, was or was not delivered before the fall of the following year? A. I do not.

Q. You don't know if any way Mr. Graham could cut one that stone before it was delivered, do you? A. I can not think of any.

Q. I want you to look at setting plan No. 4, if you please, Mr. Green (handing same to witness)? A. Yes, sir.

Mr. HARLEY: Gentlemen, I call for the production of the letter from Mr. Graham to Mr. Green, dated December 28, 1906.

Mr. HILL: We produce the letter asked for.

Q. Did you get this letter? A. Yes, sir; I received that letter.

Q. What date did you receive it? A. I received it on December 29, 1906.

Q. Were you at the office then? A. I think not.

Q. You were still absent from the office? A. Still absent.

Mr. HARLEY: Now I offer this letter in evidence. I will read it. It is the letter of December 28, 1908 (reading): "Dear Sir: I have mailed today under separate cover setting plans for courses I, J, K, L, M and N of S. Pavilion Will you kindly ask the architects to give us the thickness of the marble panels over front door head and the depth they

and caps of pilasters on the south Facade east and west of the center pavilion.

With the setting plans, you will find blue print copies on linen of Nos. 1, 2 and 3 drawings for S. Pavilion, two of each. Please let us know what others you may require.

(335) Yours very truly,

FRANK F. GRAHAM."

Mr. HILL: Do you offer that as a letter signed by Mr. Graham?

The COURT: I think if they offer a letter with Graham's name signed to it, that they offer it as a letter signed by Mr. Graham.

Q. (Mr. HARLEY) Now, Mr. Green, what setting plan covers the courses, I, J, and K? A. No. 4.

Q. What setting plans cover L. M. and N. courses? A. Setting plan No. 5.

Q. And they were received by your office when?

The COURT: He stated December 29.

A. They were apparently received the same day.

Q. Received December 29? A. Yes, sir.

Q. Is there any way that Mr. Graham could complete these setting plans without the knowledge of the thickness of the marble panels spoken of in this letter? A. Yes, sir.

Q. He could prepare the setting plans? A. Yes, sir.

Q. And show everything about it? A. Everything necessary.

Q. He could show everything about it? A. Except that one little item.

Q. Well, would it have been correct? A. It would have been quite complete and he could have asked any questions about it necessary.

Q. As a matter of fact, you know it would not have been complete until he had received this information? A. Probably not as to that particular little thing.

Q. Don't you know that is positively—not probably but positively—would not be positively correct until he got this in-
(336) formation? A. It would be right and [illegible]

Q. How could he put it in the setting plans, unless he knew it? A. That particular little item would have made no serious difference if he had not put it on the setting plans at all.

Mr. HARLEY: Repeat the question, Mr. Stenographer, if you please?

(The last question was then read by the stenographer.)

A. He could not.

Mr. HARLEY: Now, gentlemen, I have the letter of January 3, 1907, from Green to Graham. I hand you that letter dated January 3, 1907, Mr. Green, and ask you whose signature that is?

A. That is the signature of my chief clerk.

Q. Were you still away from your office then? A. I was.

Q. But this was done by your office? A. Yes, sir.

Mr. HARLEY: I offer that letter in evidence. I will read it (reading): "Sir: The setting plans Nos. 4 and 5 of courses I to N, inclusive of the granite work under your contract for the south pavilion of the Museum Building, are returned to you to-day, in a separate roll, with the architects' corrections marked thereon in black pencil.

Answering your letter of the 28th ultimo, forwarding these setting plans, you are informed that the granite work to receive the marble panels in head of doorway should be sunk not less than 4 inches.

We will obtain and forward you without delay templates for the pilaster cap and base on the south facade east and west of the central pavilion.

Your letter of the 1st instant, asking when you may expect a shipment of the stock, is received. Ten days ago the quarry contractors wrote that they would place a schedule in the quarry at once, and start shipments as soon as possible, which they expected, weather conditions permitted, would be shortly.

(337) I am writing for further information.

Yours respectfully,

Q. Now, Mr. Green, did you send these templates for the pilaster caps and base? A. My recollection is that we did.

Q. What was your object in sending them?

The WITNESS: Let me read the letter first and then I can tell you.

Mr. HARLEY: With much pleasure, sir (handing witness letter.)

The WITNESS: (Reading): "We will obtain and forward you without delay templates for the pilaster cap and base on the south facade east and west of the central pavilion." Now, what was your question?

Mr. HARLEY: Will you read the question, please?

A. To furnish them to Mr. Graham to help him out.

Q. In order that he might prepare them? A. No, sir; I don't think that was necessary.

Q. Were not the reproductions of the stone in the setting plans? A. They were to be.

Q. Will you tell me how you could reproduce a stone if it is not in the drawing? A. You can not reproduce a stone that you do not anything about.

Q. And he could not know anything about it until you sent him the information? A. Until I sent the information—

Q. You could not—

Mr. IRELL: Let him finish his answer.

Q. Had you finished? A. I think so.

Q. Will you look at this letter dated January 9, 1907? A. It is signed in proxy by my chief clerk, Mr. Sheehy.

Q. You were still away from the office? A. I believe I (338) was.

Q. While this important work was going on? A. Yes, sir.

Q. And you had been away from your office since the early part of December? A. I don't know how early it was.

Q. You were in Atlanta on the 10th? A. Yes, sir.

Q. And you took sometime to get there? A. Yes.

Mr. HARLEY: This is the letter of January 9, 1907, (reading): "Sir: The corrected setting plans of the granite of the south pavilion of the Museum Building, Nos. 4 and 5, received from you on the 7th instant, have been checked up again.

The architects still think that the bracket at each side of the doorway should be 7′ 6″ high, instead of 7′ 5½″, as you have it. They show how they get the 7′ 6″ height in a pencil sketch on the drawing No. 5, which is returned to you in a separate package by this mail. Please see if you do not find the 7′ 6″ dimension correct.

Drawing No. 4 has been found to be correct, and will be returned to you in a few days.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.
Per J. Q. S."

Q. Now, tell the gentlemen of the jury when you did return drawing No. 4? A. I don't know.

Q. Can't you tell it from the date of your approval?

The WITNESS: Where is the drawing?

(339) Mr. HARLEY: Right there, sir.

The WITNESS: What is it you want now?

Q. You state on January 9, "it is found to be correct and will be returned to you in a few days". When did you return it? A. I don't know positively.

Q. When did you approve it? A. I approved it on January 22, by my own signature to the drawing.

Q. And it gets here on January 9. Now, I want you to tell the gentlemen of the jury whether the delay of the returning and approving of the drawing from January 9 to January 22 is reasonable? A. It may have been reasonable; I don't know the precise circumstances.

Q. You have just told the gentlemen of the jury that two days was—

Q. You have just told the jury that two days was an unreasonable time for Mr. Graham to occupy in making—

The COURT: He didn't say it was unreasonable; you asked him if it was prompt.

Q. (Mr. HARLEY) You have told the jury that two days in the preparation of a setting plan was delay. Now, I want to ask you whether it is delay to take from the 9th day of January until the 22nd day of January to mail a setting plan (340) which has already been approved?

Mr. MCLANAHAN: I object to that question. Mr. Harley did not quote the witness correctly.

The COURT: I remember that you asked the witness whether two days was delay or whether it was prompt and that he gave some answer. Let him answer the question.

The WITNESS: Please repeat the question.

The COURT: State whether in your judgment a delay from the 9th to the 22nd of January in returning a plan which had been approved on the 9th was an unreasonable delay. Answer that?

A. It was not delay in my opinion. I don't remember what the circumstances were as to that particular plan. No two plans are alike and no two refer to the same kind or degree of matter. What might be a delay in two days return in one case might be a very prompt delivery if it was as much as nine days in another case.

(341) Q. (Mr. HARLEY) Will you tell the gentlemen of the jury, how, if you take thirteen days to mail a plan that has been approved, you could expect the contractor to get that work in one month as required by your specifications? A. That was not the intention of the specifications—

Mr. HARLEY: Just one moment, the court will interpret the specifications, and not you.

Q. (Mr. HARLEY) I now hand you letter dated January 23rd, 1907, whose signature

Q. Is that your signature? A. That is my signature.
Q. Your personal signature? A. Yes, sir.

Mr. HARLEY: I offer this letter in evidence with your Honor's permission. January 23rd, 1907, Mr. Frank F. Graham, etc., Sir: Your tracings of setting plans Nos. 4 and 5 for the granite work of the south pavilion of the Museum building, under your contract, have been approved and are returned to you by this mail, in a separate package. Yours respectfully, Bernard R. Green, Superintendent of Construction.' You had not yet explained why you stated in your letter of January 9th, drawings No. 4 has been found to be correct and will be returned to you in a few days. Why was it that you did not return it until January 23rd? A. I do not know: I do not remember.

Q. I hand you this letter and ask you whether it was ever received by you and if so, when? A. This letter was received by me on January 25th, 1907.

Q. From whom? A. From—

(512) Q. It purports to come from whom? A. It purports to come from F. F. Graham.

Mr. HARLEY: I offer this letter in evidence, if your Honor please. January 24, 1907. Bernard R. Green, Esq., Dear Sir:—Will you kindly send the templates for the caps and bases of pilasters on the S. Facade, east and west of Central pavilion, and which you promised in yours of January 3rd, 1907, to obtain and forward without delay. We can not cut s of the stones already shipped until we get templates for these bases. Please give this matter your early attention, and oblige, Yours very truly, F. F. Graham." Now, gentlemen, will you kindly let me have the letter of February 13th, 1907, from Mr. Graham to Mr. Green?

Mr. HILL: Here it is, Mr. Harley.

Mr. HARLEY: Did you receive this letter dated Feb. 13th, 1907, and if so, from whom? A. I received this letter from Frank F. Graham, purporting to come from Frank F. Graham, on February 15th, 1907.

Q. 1907? A. Yes, sir.

Mr. HARLEY: I offer the letter with your Honor's permis-

to the wall on two different faces. I thought it best to put the joint at the separation of these faces and same as at the wall face. As the F. S. detail shows the jointing differently from the approved setting plan *No.* 1, kindly say which we must follow (see enclosed sketches). The F. S. D. also shows a joint at top of square base raking B. course in two stones. Please allow us to make this in one stone as on setting plan *No.* 1 or it will necessitate renumbering stones on this approved plan.

Will you also ask the architects or your deputy at the (313) building to mark with shade lines on the enclosed tracing the intersection of the stones we are to furnish and those already in the building, and give us the necessary data so that we can correctly figure the jointing. Say, for *instant*, the distance from center of existing piers to the joints dividing new and present work, also to furnish us with full sized details for this entablature. Sometime ago Mr. F. F. Graham had some correspondence with you about changing the architrave stones in cornice over portico columns into two stones, as shown they are over thirteen feet long, 5′ wide, and 3′ high and will weigh over 35 tons, and as they are elaborately cut on three sides, will require such careful and delicate handling that it will be almost a miracle to set them in position without damage.

I should be glad if you would let us know whether this change will be acceptable *before* making my setting plans for the courses (see enclosed sketch). Yours very truly, Frank F. Graham."

Mr. HILL: This is the enclosed sketch (indicating)?

Mr. HARLEY: Is that the enclosed sketch? A. It looks like it.

Q. Have you any recollection of it at all? A. Yes, I recall the plan; the drawing.

The COURT: Was there any other correspondence about that?

Mr. HARLEY: Yes, if your Honor please. Now, I want to ask for a letter of February 14th, 1907, from Mr. Green to Mr. Graham, and the next letter—

Q. Look at the letter dated February 14th, 1907, and state whose signature that is. A. Mr. [illegible]

Q. You were again away from the office? A. I do not know where I was then. I might have been out for the day.

Q. And it is signed by your chief clerk? A. Yes, sir.

Q. The clerk in your office? A. Yes, sir.

(344) Q. The clerk in your office? A. Yes, sir.

Mr. HARLEY: I offer this in evidence. February 14th, 1907, Mr. Frank E. Graham, etc., Sir:—Your tracing of setting plan No. 6 for the granite work of the south pavilion of the Museum Building, under your contract, was approved and returned to you on Monday, the 11th instant. Yours respectfully, Bernard R. Green, Superintendent of Construction, Per J. Q. S." Will you look at the 6th setting plan and see what dates you did approve it? A. No. 6.

Q. No. 6 O. P. Q. course, is it not? A. Yes, apparently.

Q. Don't you know it is—not apparently—isn't it O. P. Q.? A. Let me look at it?

(Paper handed to witness.)

The WITNESS: This is setting plan No. 6.

Q. What course? A. Course O. P. Q.?

Q. When was it approved by you? A. February 9, 1907.

Q. February 9, 1907? A. Yes, sir.

Q. And the letter stated it had been returned on Monday, the 11th instant. Now, gentlemen, letter of February 16th from Mr. Green to Mr. Graham. Look at the letter dated February 16th, 1907, and state whose signature that is. A. That is the signature of my chief clerk, Mr. Sheehy.

Q. Were you then at the office? A. I do not think I was. The fact that he signed the letter instead of myself would indicate that, apparently.

(345) Q. He also signed the letter—

Mr. HARLEY: Now, Mr. Green, were you at your office on that day? A. I do not know.

Q. Your chief clerk also signed the letter of February 11th which I showed you in advance of that letter? A. Yes.

Q. You were not there then? A. I can not say. I do not remember whether I was there or not.

Q. When you are there does your chief clerk sign your mail? A. Usually not.

Q. Don't you know that you were away. A. I do not remember.

letter of the 13th instant, received yesterday, as to jointing of pilaster bases of the south pavilion of the National Museum building.

This jointing should be done to correspond with that of the bases already built on the two wings, so as to show uniformly in the future when the joints become weathered conspicuous. You had better wait for Mr. Pirie to fix the matter for you, as I understand he is to arrive in a few days. I am ill at home and unable for the time to look into the whole facts." You were away from the office ill. "As to the other points, I think there can be no objection to cutting the cornice stones you mention in single courses, and am sure we will have to arrange for some jointing of the heavy lintels over the portico, but I will defer that a little until I can get out and compare drawings."

The WITNESS: Let me see the letter. You say I was away from my office?

Mr. HARLEY: Yours respectfully, Bernard R. Green, Superintendent of Construction, Dictated by Mr. Green.

The WITNESS: That would indicate that I was not far away from my office when it was dictated by me. It is probable that I was layed up at home with a cold, a short distance from my office and I communicated with the office by telephone.

Q. In this letter you approve of the suggestions of Mr. Frank F. Graham as to dividing these large stones? A. Yes, I was very glad to do that.

Q. What? A. I was very glad to do what he proposed.

Q. Because they were too large? A. Because they were too large for convenience and for him.

Q. And also for you? A. To a certain extent, yes, sir.

Q. The great trouble was, you couldn't handle them so well? A. Yes, perhaps.

Q. Look at setting plan No. 7. You have stated two days ago in your Direct Examination on Record Page 79, that you had received it on March 20th. You say this drawing No. 7 was received from Mr. Graham on March 20th, 1907? A. It is so stamped.

Q. You so stated in your testimony? A. I took that testimony from the stamp.

Q. Letter of Mr. Green to Graham, dated April 20th,

Q. The office sent this letter? A. Apparently it did.
Q. Don't you know, as a matter of fact, that it did?

The WITNESS: How do I know; I did not see it go?

Q. And you never saw the copy of it? A. I saw the copy of it in the letter book.

(317) Mr. HARLEY: I offer in evidence letter of April 29, 1907, if you Honor please. Mr. Frank E. Graham, etc., Sir: Your setting plan No. 7 has just been checked up, and is returned herewith with corrections noted in black pencil, which cover some changes in dimensions in all courses and the omission of the horizontal joint in course R and a vertical joint in each end of Course F.

Please check up the correction and make the necessary changes in the tracing, returning it to this office for final approval. Yours very respectfully, Bernard R. Green, Superintendent of Construction, by John Q. Sheehy, Chief Clerk."

Q. Will you please explain to the jury how it was that this plan, which was received in your office on March 20th, was not checked up until April 29th, a*nd* month and nine days later? A. The drawing contains the most complex and important, so far as the minor detail is concerned, of the stones in the whole work, representing the pilaster caps in portico. They involve a considerable amount of study on the part of the architects and detail consideration; that as soon as the setting plans were made up for their further consideration, and checked, which took naturally considerable time. That had to be considered in connection with contiguous work necessary in a building. The drawing represents only one very important course in the whole job from the bottom of the pavilion to the top of the dome drum and was merely a trifle so far as the whole work was concerned. The work, as I stated, necessarily involved very careful study and consideration and therefore it took more time than did almost any other portion in the whole set to be checked up by the architect.

Q. And this trifle took you from March 20th to April 29th? A. Apparently it did.

Q. This is signed by your chief clerk? A. Yes.

Q. Were you at the office at that time, or were you away again? A. I think I was away at that time.

Q. You were away in April and May of 1907, were you?

Q. Did you make them to suit Mr. Graham or to suit the sculptor's model? A. I did not make them to suit anybody in particular, that is to suit anybody—rather the work itself—which was to some extent to the benefit of Mr. Graham and to some extent to the benefit of the work, that is the Government.

Q. I show you this paper and ask you what it is.

Mr. McLANAHAN: If your Honor please, we object. We have looked over the paper and we object to that question. Our ground of objection is simply this: That is that supplemental contract which has never been signed or approved and which Mr. Green testified he drew up and sent on to Mr. Graham after the $4,000.00 allowance was agreed upon by correspondence. There was nothing further done and we do not see the validity of it. The whole force of the $4,000.00 comes in under the correspondence and we do not see how it is relevant in any way. There is no objection particularly.

The COURT: What is the purpose of it?

Mr. HARLEY: If your Honor please, it is the unexecuted contract which Mr. Green has several times referred to. It is all through the testimony and we want to show—we want to Cross Examine him as to the items that constitute that. May I show it to the court? (Handing paper to the court.) Why not let it come in subject to exception as we have numerous other papers on the other side.

Mr. McLANAHAN: We object absolutely to that being offered. My brother doesn't say that he will ever show it is a valid contract.

Mr. HARLEY: It isn't offered as a valid contract. It is offered as evidence tending to show some relevancy to this situation, if your Honor please.

(319) The COURT: You will have to state more definitely the purpose of the offer.

Mr. HARLEY: Does your Honor decline to let it come in subject to exception?

The COURT: I do not want to encumber the records with a paper unless it has some pertinency.

executed. Mr. Green has alluded to a certain paper which was not executed and we want to get that in the record.

Mr. Hill: How is it a contract if it was never executed?

Mr. Harley: It is not a contract and not offered for that purpose.

Mr. Hill: You said it was a contract.

Mr. Harley: It is a supplemental contract.

Mr. Hill: Who calls it that?

Mr. Harley: Mr. Green has a number of times in his testimony.

The Court: Put it in subject to exception; I can not see the pertinency of it.

Mr. Harley: Supplemental contract in subject to exception—

Mr. Hill: Do not put that down Mr. Stenographer; it is only a draft of a contract.

Mr. Harley: I offer this paper in evidence, and it is subject to exception. It says on here that it is a supplemental contract.

(Said supplemental contract is fully set forth in the forty-second assignment of errors heretofore inserted in the record; and it is hereby agreed that this reference thereto shall operate as fully and effectually as though said supplemental contract had been here set forth at large.)

The Court: That was only a tentative proposal but the contract isn't signed by anybody.

Q. Is this the unexecuted contract which was prepared by you and to which you referred in your testimony? A. It appears to be that.

Q. Isn't it, Mr. Green, look at it? A. I can only say that it does look like it, it bears the usual marking and appearance.

Q. Didn't it emanate from your office? A. It looks like it did.

Q. Was it ever executed by the Title Guaranty & Surety Company? A. No, sir.

Q. Was it ever executed by the Regents of the Smithsonian Institution? A. No, sir.

Q. Is this substantially the supplemental contract——

(Objection to and in subject to exception.)

Q. Is this the supplemental contract to which you have referred? A. It is.

Q. And it was never executed?

The COURT: It is admitted from the very beginning that it was never executed.

Mr. HARLEY: I just want to get that on the record.

The COURT: It is on the record where it was spoken of in the examination in chief.

Q. (Mr. HARLEY) You said you did not do that to suit anybody. I want you to look at this and see if you can refresh your memory by it.

The COURT: A letter was written by Mr. Graham to Mr. Green stating he thought he ought to have an allowance for this extra work.

Mr. HILL: Mr. Green has testified in reference to that that Mr. Graham wrote and asked for certain extras that, after some discussion they reduced his amount and allowed him $1,000; that they sent a draft for the contract to Mr. Graham and he didn't return it.

Mr. HARLEY: All I am trying to prove is—

The COURT: That is the paper that was sent by Mr. Green's office and received by Mr. Graham but never executed by anyone.

Mr. HARLEY: That is right. Can you refresh your memory by referring to this paper. I merely want to cross examine you on this.

The WITNESS: I think I can explain this language here so it will be clear to the counsel.

(351) Mr. HARLEY: We think as the case progresses it will be very material at whose instance the change was made.

The WITNESS: The language in here is probably what the counsel had in mind. The breadth of the columns and pilaster caps increased to suit the sculptor's model. To suit the sculptor's models—the models were not individuals. It is meant to increase them in order that the stone could be cut in accordance with those models.

Q. That is exactly what I thought, Mr. Green. Then it was increased to suit the sculptor's models? A. Yes, not the sculptor.

Q. It was increased to suit the sculptor's models and not at the request of Mr. Graham? A. No, to suit the models.

Q. Look at the drawings and setting plans No. 7 and state when you approved it? A. I approved it on May 20th, 1907.

Q. You received it March 20th and first had an opportunity to examine it on April 29th, and then you sent it back with certain changes to suit the sculptor's models, not at the request of Mr. Graham, and then you approved it on May 20th? A. Yes.

Q. Now, letter of May 24th, from Mr. Green to Mr. Graham. Whose signature is this? A. My signature.

Mr. HARLEY: To Mr. Graham, May 24th, 1907, we offer this letter in evidence if your Honor please. Mr. Frank E. Graham, etc., Sir: It transpires today that the architect had not fully corrected your tracing of setting plan No. 7 which I returned to you with my signature of approval on the 21st instant, and they have forwarded to me the enclosed blue print of the drawing with additional corrections marked thereon. Will you please therefore have these corrections placed upon the tracing as far as you can understandingly, and then return it, together with this blue print to me for check and final approval. Yours very respectfully, Bernard R. Green, Superintendent of Construction." Now, that refers to further (352) changes for the same purpose, does it not? A. Yes.

Q. Something that Mr. Graham had nothing to do with, I say, something that Mr. Graham had nothing to do with? A. What was something that he had nothing to do with?

Q. This change to suit the sculptor's model? A. Well, he didn't have anything to do with making the change, if that is what you ask.

Q. He sent it back, what time did it get back after you wrote for it on May 24th? A. I do not know.

Q. Look and see whether you can find out, if you please, sir? A. I do not see any stamp that shows when it came back again. It came back, however.

Q. When was it next approved? A. When was it next approved?

Q. Yes. A. It was approved again on June 29th, 1907.

Q. Letter of June 29th from Mr. Green to Mr. Graham. Look at the letter dated June 29th, 1907, and state whose signature that is. A. My signature.

Q. Your signature? A. Yes.

Mr. HARLEY: I offer the letter in evidence, may it please the court. Mr. Frank F. Graham, etc., Sir:—I am sending you today, by the hand of Mr. Piric, the Inspector, a blue print of your setting plan No. 7, which has just been completely checked up by the architects.

Please look it over with reference to checking off such stones as you may already have stock for, and transmit it to us for record and transmission of copies of the drawings to the Thompson-Starrett Co. to quarry by.

(353) That company has written urging the sending of the remainder of the setting plans as soon as possible. I had supposed that you had made considerable progress in the preparation of those plans, but am disappointed to hear today from Mr. Pirie that he thinks you have suspended work on those plans for sometime past. The Thomson-Starrett Company will very shortly be through with the heavy quarrying for their cut work on the Museum building, which will leave the quarry open entirely to the getting of your stock. It is very necessary, therefore, that they have all the remaining plans in order to do the quarrying to proper advantage all around. It will be unfortunate if they find any excuse for delay through want of seasonable setting plans. Yours very respectfully, Bernard R. Green, Superintendent of Construction." Now, Mr. Green, what heavy quarrying did you refer to? A. Let me see the letter so I can get the context.

(Letter handed to witness.)

The WITNESS: "The Thompson-Starrett Company will very shortly be through with the heavy quarrying for their cut work on the Museum building, which will leave the quarry open entirely to the getting of your stock." The cut work on the Museum building means other work for the same building outside of the Graham contract.

Q. Work that Mr. Graham had nothing to do with and they advised you they would soon be through with that and leave the quarry open entirely to the getting of your stock. Now, Mr. Green, look again at your setting plan No. 7, and state when it was again returned to your office. A. It come back to my office on June 29th from the architects, the same date on which I approved it the second time, as I have already stated. Now you are asking when it came back after that?

Q. If you please. A. I do not know when it came back after that; I do not see any stamp.

Q. Let us follow it along and see if we can not find out. Look at the letter which I hand you dated July 2nd, 1907, and state whether it was received by you? A. It was received on July 3rd, 1907.

(354) Q. July 3rd, 1907? A. Yes, sir.

Mr. HARLEY: I offer the letter in evidence with your Honor's permission. Bernard R. Green, Esq., Dear Sir:—Yours received this morning; in reply beg to say that setting plan No. 7 for Museum pavilion was sent from here March 18th, was returned for correction early in May and blue prints (linen and paper copies) sent you, although owing to your absence the original was not approved. The original has since been recalled for further changes and was taken to Washington by William Pirie. This should be returned for correction, so that we may obtain blue prints of corrected and approved drawings.

I do not proceed with this work because the jointing of courses above and the ceiling of portico are contingent upon these courses. Upon receipt, however, of the approved plan I will set to work at once as I am anxious to progress as rapidly as possible with this work. Yours very truly, F. S. Graham."

Q. You got that letter? A. Yes.

Q. What Mr. Graham, it is true, is it not, that the jointing of courses above and the ceiling of portico are contingent upon these courses, is that true? A. It isn't exactly true, no, sir.

Q. It isn't true in any respect, is it? A. I do not think it is: it is not especially true. Very little of that work depended—I do not know that any of it did—as to making the setting plans upon this plan.

Q. You do not think it is contingent at all upon that work? A. I do not think so: if so, very slightly.

Q. Look at this letter dated July 2nd, 1907, and state whose signature that is? A. My signature.

(355) Q. You sent that letter to Mr. Graham? A. Yes, sir: saying—

Mr. HARLEY: I will read it. I think I can read it quicker than you. July 2nd, 1907, Mr. Frank E. Graham, etc., Sir: I return herewith, approved, your setting plan No. 7, of the South Pavilion granite work of the Museum building. Yours respectfully, Bernard R. Green, Superintendent of Construction."

Mr. HARLEY: Gentlemen, I would like to have a letter from Mr. Pirie to Mr. Green of July 25th, 1907.

Mr. HILL: Your Honor, we would be very glad to put in evidence all the correspondence but my brother is now asking for a letter written by Mr. Pirie, is that it?

Mr. HARLEY: Mr. Pirie, yes.

Mr. HILL: From Mr. Pirie to Mr. Green—it isn't by Mr. Graham to Mr. Green or Mr. Green to Mr. Graham. We will be very glad to put all the correspondence in evidence, but we decline to produce individual letters. They can prove them by their copies, if they have them.

Mr. HARLEY: It is already stated that Mr. Pirie was a Government Inspector on Mr. Graham's work.

Mr. HILL: We object to this until they prove that it is a copy. They are offering what purports to be a letter here written from Mr. Pirie to Mr. Green. We do not know anything about that at all.

Mr. HARLEY: They have in court the original letter and we have called upon them to produce it and we now renew that demand.

Mr. HILL: We are very glad to offer that correspondence, every bit of it, but we are not going to offer individual letters.

Mr. MCLANAHAN: If you will allow all of Mr. Pirie's letters to come in to Mr. Green and all of Mr. Green's letters to Mr. Pirie, we will not object. Will you do that? We are glad to have all of that correspondence come in.

Mr. HARLEY: We are going to do this. We are going to renew right here our demand for the original letter of July 25th, 1907, from Mr. Pirie, who was Inspector on the work, (356) reporting on this job, absolutely in charge of it to Mr. Green.

The COURT: I understand they decline to produce it unless it is understood that all the correspondence comes in. Proceed.

Q. Now, Mr. Green, look at this and state whose signature it is?

Mr. MCLANAHAN: We object if your Honor please.

The COURT: Objection overruled.

(Exception noted.)

The WITNESS: It looks like the handwriting of Mr. Pirie.

Q. Didn't you, on or about that date, receive the letter of which that is a copy? A. Let me see if I can find out. I received a letter very much like this; I do not know that that is a correct complete copy of it though.

Q. It contains the substance of the letter which you received, does it not? A. Some of the points I recognize.

Mr. McLANAHAN: If your Honor please, we object to the offering of this in evidence until this is properly identified as a copy. Until it is proven that that is a copy, we object.

The COURT: Objection overruled.

(Exception noted.)

WITNESS: It is written in pencil.

Mr. HARLEY: That is right.

(Copy of letter mailed to office with letter of Mr. Bailey.)

(357) July 25, 1907.

I am returning Mr. Bailey's letter to you with but a few remarks, because I think from what you saw here the other day and what you have read on the subject, you are satisfied that Mr. Graham has not been getting the net dimension block that he might reasonable expect to get under your specifications of Sept. 20, 1906.

A great deal has been said by the people that handles that stone about the way it lays in the hill. That it will not split as other stones do, because it is Bethel, we are likely to get it anyway that we can get it with the least pains. About that I have to say that lines can be laid on Bethel stone giving a 2″ or 3″ allowance and split as well as any other stone, and I have been told here by men that have worked Woodstock and Milford granite all their lives that it splits much better than either one and with the exception of the Mount Airy granite I know of no granite that splits better than Bethel when gone at with the intention of splitting it as Mr. Graham does. There is no witchcraft about that, and they got no information about handling it except the benefit of my experience and we have spoiled nothing so far, neither, have we mended or patched, I (358) am pleased to say. The split faces which you looked at in Graham's yard the other day made by him will bear me out in that, I think. So much in favor of Bethel granite as a splitting stone. Mr. Ellis and Starrett have a perfect right to cut rough patterns at their own plant so long as they pay

men time for working on them. If the shoe was on the other foot, they would see the difference. I am intimately acquainted with quarrymen at Barre, Vermont, who inform me that they keep a gang or two of cutters to cut up rough and unshapely patterns in order that they may give their customers what is known in the trade as good ones, as patterns improved slightly the quality of stock went down on all ashlar and although it may have been about as Mr. Bailey says fully up to the standard of such stock as was being accepted when he went to Northfield last fall the stock which we were taking them was mostly going on the runners above H course and what might answer there is not good enough for the same course around the main entrance and over the portico floor in my opinion being below the sample and nearer to the eye, and I think if Mr. Bailey's attention was called to that, he would agree with me. The contractors also should if they have any interest in their work. I refer to such stones as B-17 and 18, and ones similar to B-32. Stones that I may raise a few courses in hopes that I will get better but cannot in some cases put on their turns and back in the two breaks where I would like to put those with a half dozen more or less soft spots such as was shown you the other day here. This question of quality is very important to the building in the location we are working in, and when compared with rough patterns is correspondingly important to Mr. Graham. If one of these small ashlars is to cost 4 to 8 hours more of a cutter as they usually do, he will cry out aloud and refuse to cut much stock as is not all stone. It is unfair to expect him to do that in order that the quarry contractors may get rid of such small pieces as I refer to of ev very near the top of the quarry. He has found no fault about the headers and other square stones which is all reasonably near the standard so far as quality is concerned.

I see by Mr. Bailey's letter that his attention has been called to the soft spots and I look for a better lot of small ashlars, (359) in case however some one might get the impression that a poorer grade will answer as we get up and away from the eye. I think it best to give fair warning that Mr. Graham will not cut material that can not be classed as all stone; if they can not get good quality of the proper thickness, Mr. Graham informs me that they can take sheets thick enough for two ashlars and rift them down the same as he has done with that stone, and get him such stock as he can and expected to cut, and put inferior stock over the dump or try to cut it themselves. He can not afford to try it, but is finding no fault with cutting good and fair stock. Yours respectfully, Pirie.

Q. Now, Mr. Green, this Mr. Pirie was the Inspector on the Graham job representing the Government? A. He was.

Q. And he told you that Mr. Graham had not been getting out dimension blocks? A. Yes, sir.

Q. And that the quality of the stone was poor? A. Yes, that was his statement.

Q. And that it required more work in order to cut it out? A. That is what he indicated in that letter to a certain extent.

Q. That is what he indicated. Now, coming back to that No. 7 again. Letter of August 13th from Mr. Graham to Mr. Green.

Mr. HILL: Here it is.

Mr. HARLEY: Did you receive that letter? A. I did.

Q. It is a letter purporting to come from Mr. Graham? A. Purporting to come from Mr. Graham.

Q. About the Graham job? A. Yes.

Mr. HARLEY: I offer this letter of August 13, 1907, in evidence with your Honor's permission. Bernard R. Green, Esq., Dear Sir:—When S. pavilion setting plan drawing No. 7, was returned for correction the heighth of paneled freze of portico (course T. U. V.) was figured on same, I suppose by the architect, bottom rail 1′ 4½″ panel 2′ 4″ top rail 1′ 3½″ (396) total heighth 4′ 8½″. The F. S. D. Drawings for this measure bottom rail 1 2½″ panel 2′ 4½″ top rail 1′ 1½″, total heighth 4′ 8½″. Are we to work to the figures on setting plan or F. S. D.? There is also on this sheet an apparent discrepancy between the dimension given at top and bottom of pilaster cap (stone 58 course T) see enclosed sketch. I should like to be assured that we may safely work to the lower dimensions; I mean as to cutting the adjoining stones. Please give me an early reply. Yours very truly, F. F. Graham." Look at the letter dated August 15th, 1907, and state whose signature that is, please, Mr. Green? A. That is my signature.

Q. I offer this letter in evidence. Mr. Frank F. Graham, etc., Sir: There is mailed to you in a separate roll drawing No. 208, full sized detail of pilaster cap.

As to your letter of the 13th instant, concerning a discrepancy in heighths of member of courses T. U. and V., the heighths should be as per full size detail drawing, namely:

Bottom rail,	1′ 2½″
Top rail,	1′ 1½″
Panel,	2′ 4½″
Total,	4′ 8½″

As you failed to put on your original tracing of drawing No. 7 any of the heights of these courses, I did it in the middle

of the plan, as you will see, in my own handwriting, after obtaining the figures by telephone from the architects, because I had no copy of the full size detail. The architects gave me the wrong figures by mistake, and I wish therefore you would return to me the tracing so that the figures may not only be corrected, but that I may send correct blue prints from the drawing to the parties in Vermont, the foreman of the work at the building, and the architects.

Concerning the apparent discrepancy between dimensions of top and bottom of pilaster cap #20 course T, I explain: (361) The 6′ 2½″ dimension pertains to the finished block, excepting the profection for the abecus at its two horns, which, when finished, will measure across 7′ 2½″ and it will be necessary for that part of the stone to be correspondingly broad for the two side corners of the horns. You will see that, for the two front corners of the horns, the finished stone will project 2′ 1½″ from the face of the wall.

There is returned to you in a second roll, corrected and approved, setting drawing No. 9. You will observe the numerous corrections, especially in course 2, for lengths of stones, and including the six 5″ thick slabs on the tops of the blocks in single stones with the blocks themselves, but it will not be necessary to cut the angle in the rabbet very sharp. Observe also that pairs of stones 3 and 4, and 15 and 16 on the returns of course Y are each to be in a single stone, so as to permit a good bearing and anchorage on the wall for the projecting corners. Yours respectfully, Bernard R. Green, Superintendent of Construction." Now, letter of August 17th, from Mr. Graham to Mr. Green.

Mr. Hill: Here it is, Mr Harley.

Mr. Harley: Thank you very much, sir.

Q. Look at the letter dated August 17th, 1907, and state whether you received it? A. I received it on August 19th, 1907.

Q. Thank you, sir, August 19th? A. As purporting to come from Frank F. Graham.

Mr. Harley: I will offer this letter in evidence. Bernard R. Green, Esq., etc., Dear Sir:—In laying out setting plan for course Z4, I find at the outer angles of pilasters to front gable, over base course at attic floor, that ashlar is 6′ 6″ long on the face with a returned head of 5′ 4 3/16″; this is an awful size for ashlar and I respectfully ask permission to change this by simply reversing the stones on face of pilaster as shown on enclosed sketch, thus having a long stone with a

short head on each alternate course. This will not make any (362) change in the return walls but will necessitate changes in face of pier of courses from z2 to z8, inclusive. If you or the architects will suggest any other way, I shall be glad to adopt it.

Thanks for the explanation in yours of the 15th instant. I shall feel safer in going ahead with this work now. Have received details of pilaster neck No. 208 also setting drawing No. 9, and have returned by this mail No. 7 setting plans as requested. Your calling my attention to the numerous corrections in course Z induced me to think you are under the impression they were caused by mistake. This is not so. I carefully followed the figures on the $\frac{1}{2}$" scale detail No. 156 and the F. S. D. portico cornice No. 161. On the latter the face of parapet wall is marked $13\frac{3}{4}$" back of frieze line which corresponds with figures on $\frac{1}{2}$" scale drawing. The architects now figure it on the same face as the frieze, hence the change in all the dimensions. Yours very truly, F. F. Graham."

Q. This drawing refers to what setting plan? Just to refresh your memory Mr. Green. It seems to be 89, does it not? A. Well, this drawing shows courses from Z1, 2, 3 up to z ', inclusive. Whatever are the setting plans for them are the setting plans referred to.

Q. It has no reference to No. 7? A. No, I should think not.

Q. The letter refers to No. 7 but the drawing doesn't. A. That is it.

Q. Letter of August 20, 1907. Look at the letter dated August 20th, 1907, signed by Bernard R. Green and state whether that is your signature? A. It is.

Q. You mailed that letter to Mr. Graham? A. If it was mailed at my office in the usual way.

Mr. HARLEY: I offer this in evidence. Mr. Frank F. Graham, etc., Sir:—I mail you herewith revised setting drawing No. 7, for the granite work of the south pavilion of the National Museum building, which shows the following corrections:

The rises of courses T, U, and V in the middle sections (363) corrected

from		to	
Bottom rail,	1′ $4\frac{1}{2}$″	Bottom rail.	1′ $2\frac{1}{2}$″
Panel,	2′ $0\frac{1}{4}$″	Panel,	2′ $4\frac{1}{4}$″
Top rail,	1′ $3\frac{1}{2}$″	Top rail,	1′ $1\frac{1}{2}$″
Total,	4′ $8\frac{1}{4}$″	Total,	4′ $8\frac{1}{4}$″

The corner pilaster caps are split at each course into two stones on the diagonal or mitre line through the corner.

The numbering of the component stones of these as well as those of the two flat pilaster caps, is done by the use of the sub-letters A, B and C. Yours respectfully, Bernard R. Green, Superintendent of Construction." Then, Mr. Green, the last time that you approved these plans, setting plan No. 7, was August 20th, is that right? A. Yes, sir.

Q. And they were received first at your office on March 20th. I want you to tell these gentlemen of the jury how Frank F. Graham was responsible for one hour's delay between March 20th and August 20th, 1907? A. Responsible for what delay?

Q. You have stated in your testimony that these plans were in your office on March 20th. I followed that up by a tedious course of correspondence showing these changes were made by you, and you said they were made by you. I want you to tell the gentlemen of the jury whether Frank F. Graham was responsible for any of that delay from March 20th to August 20th, 1907? A. He was not responsible for any delay in regard to the particular circumstance, the particular stones that were changed in this particular plan. It isn't a set of plans, only this one plan that is referred to, No. 7. There are a few stones in that one course only, of the three courses shown—

Mr. HARLEY: We can not hear you, Mr. Green, will you kindly talk louder? A. I say that Mr. Graham was not responsible for any delay in the cutting of the stones in the upper courses shown by this plan, chiefly the stone postings, the pilaster caps, which were the subject of the reconsideration by the architects and the restudying and refiguring to some extent (361) which was the reason as I explained before.

In regard to this plan for the time consumed in finally completing it, although it went back and forth two or three times between Mr. Graham and my office and the architect, while this construction was in progress, it affected only a very few stones in those two or three courses, but as far as the general progress of the work was concerned, it was a mere trifle.

Q. And that trifle kept you from March 20th to August 20th? A. Kept who?

Q. The United States? A. I didn't keep Mr. Graham standing still any such length of time as that. There was plenty of work to do all the way through. He had plenty of stone to work on all the way through. This is a mere bagatelle in the job. It didn't amount to anything.

Q. Yet, under your specifications, isn't he entitled to the stone from the quarry within one month after he presents the plan to you?

Q. Have you plan No. 8 there? A. I do not find plan No. 8 here among my stock.

Mr. HARLEY: Here are plans Nos. 8 and 9. When was No. 8 plan received by your office? A. Plan No. 8 was stamped received by us on July 30th, 1907.

Q. Look at this please, and state whether or not you made any change on that (handing plan to witness)? A. Made any change on it?

Q. Yes. A. There were some changes made, slight changes made in the lengths of stone in one of the courses shown in this plan, course W 3. Those were changes all of a few inches. Stones that were marked 7, 8 and 6′ 10″ long, etc., we changed along the front slightly and from an inch or two to in some cases one or two cases, as much as five or six inches.

Q. Now, look at plan No. 9, please, sir, and state when it was received? A. It was received on August 5, 1907.

(365) Q. And was approved when? A. Approved by me on August 15th, 1907.

Q. No. 10 you say was also—you haven't that before you? A. No, sir; I haven't No. 10.

Q. Is that No. 10 setting plan, please, sir? A. No, sir; this is No. 8.

Q. I believe this is right, is that No. 10, sir? A. That is No. 10.

Mr. HARLEY: Gentlemen, I have here the letter of August 22.

Q. I hand you letter dated August 22, 1907. Please state whose signature that is? A. That is my signature in proxy by one of my clerks, Mr. Rabbitt.

Q. Were you absent at the time? A. I don't know; probably I was.

Q. This seems to be dictated by you? A. I suppose it was dictated by me and signed for me.

Mr. HARLEY: I offer this letter in evidence (Reading):

"Sir:

The suggestion in your letter of the 17th instant, as shown by the tracing herewith, for the arrangement of corner stones for the Z courses in attic, is approved. In fact the original drawing by the architects was laid out that way, but got changed in tracing by mistake.

As to the corrections in course Z, I did not consider them as caused by any mistake of yours—they pertained to the architects' work.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.
Per W. H. R."

Mr. HARLEY: Have you the letter of the 17th?

Mr. HILL: Yes, sir; you already offered that letter in evidence.

Q. How many sets of the setting plans does that mistake of the architects affect? A. If you will just let me see the plans, I can answer the question.

(366) Q. Certainly. But may I refresh your memory and ask you whether or not it does not refer to all the setting plans from No. 9 to No. 17 inclusive—9, 10, 11 and so on up to and including 17? A. It refers to the corner stones only, on the two corners, and it probably affects several of the Z courses. I don't know what plans happen to include them. This plan (indicating) includes them.

Q. It is important, Mr. Green, that we know what plans it does not affect. Can you tell, if I hand you all the plans? A. I don't know if I can.

Q. Don't you know that those Z courses ran through all the plans from 9 to 17 inclusive?

The WITNESS: I don't know yet; where is the letter where I answer him?

Mr. HARLEY: That is your answer (indicating).

The WITNESS: This is my letter answering the 17th

Mr. HARLEY: Yes. Let me hand you a copy of his letter.

A. I see by the letter to which I made answer that the answer evidently covers one or two stones in each of the courses in Z 8. This plan contains courses Z2 and z 3, and I suppose the courses on the other plans are similar.

Q. Let us see on how many plans that is so. It is important to us to know how many are affected by it. No. 9 is, is it not?

The WITNESS: Let me see No. 9.

Mr. HARLEY: I will with great pleasure. (Handing same to witness.) Now, I will give you No. 10—

The WITNESS: Let me understand the letter which I answered first. After I do that I can answer your question. Mr. Graham writes here—

Mr. HARLEY: Just one moment. You examine that first and then let me ask the questions.

The WITNESS: Very well, sir. Where is the enclosed sketch referred to in this letter?

Mr. HARLEY: I think the District Attorney has that. Mr. Hill, Mr. Green would like to have the sketch enclosed in (367) that letter, please, sir.

The WITNESS: What question have you asked me now?

Mr. HARLEY: Are you ready to be questioned? Have you your mind clear on the subject?

Q. (Mr. HARLEY) What is the number of that setting plan (indicating)? A. That is No. 11.

Q. You have already had No. 10? A. Yes, sir.

Q. Now, I believe you stated that No. 10 was affected by the mistakes mentioned in that correspondence, is that correct, sir? A. Yes, sir.

Q. Now, look at No. 11, please sir. Is No. 11 affected by the mistakes mentioned in that correspondence? A. Yes, sir.

Q. I hand you setting plan No. 12 and ask you whether it is affected by the mistakes mentioned in that correspondence? A. It is, very slightly; very slightly.

Q. I hand you setting plan No. 13 and ask you whether it also is affected by the mistakes mentioned in that correspondence? A. It is, very slightly; two little stones here (indicating.)

Q. I hand you setting plan No. 14 and ask you whether it is affected by the mistakes mentioned in that correspondence? A. It may be, slightly; it is not clear.

Q. It is not clear to you, but it may be slightly? A. Yes, sir; it may be slightly.

Q. Look at No. 15 setting plan and state whether or not it is affected by the mistakes mentioned in that correspondence? A. I don't think it is.

Q. Look at No. 16 and state whether or not it is affected by the mistakes mentioned in that correspondence? A. I (368) don't think it is, sir.

Q. You do not think it is affected in any manner whatever? A. I don't believe so. It does not appear on the plans and judging from the correspondence I feel quite sure that it could not have been affected in the manner referred to, or any other manner that I know of.

Q. How many are there then that are affected by it? A. Well, you can count them up.

Q. Do you know any way that those setting plans could be accurately prepared before those mistakes of your architects were corrected? A. I think they could have been accurately prepared, because the business of the contractor in making these plans was to do his own figuring from the dimensions which he had to work from. He made the mistakes, and that was one of the objects of the contract requiring the drawings to be submitted to us. All of this was the work of the contractor. He had the dimensions and everything to make his setting plans, and his business was to make the setting plans and do his own figuring and make them to fit in the parts of the building in accordance with the contract plans with which he was furnished in the first place. He could have gone on if he was desirous for the progress of the work. He could have gone on. It was his business to make these plans and go on with his work without submitting it to our office at all. But we required this thing as a matter of precaution for his benefit particularly. He will get on a great deal better if we, with our knowledge of the building, could look over his shoulder, so to speak, and watch him so that he could not make mistakes, and it was a good way to save delay. We required this proceeding in the contract.

Q. Where did you require that in the contract? A. In the specifications.

Q. What section? A. Section 9, I guess.

Q. Now, here are the specifications, just see what you (369) required there, sir. A. In paragraph No. 9 "the contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at one-quarter foot to the inch scale, prepared, lettered and numbered as may be directed by the Superintendent of Construction." I was to direct him in this thing.

Mr. HARLEY: That is your interpretation of it. Just read what is there.

The WITNESS: (continuing) All right "and submitted to him not less than one month prior to the commencement of the work on the cutting of the stones they represent, to give

ample time for examination and approval. The setting plans for the lower courses of the basement story (the first courses to be cut) must be prepared and submitted immediately after the execution of the contract."

Q. That is the part of the contract you referred to? A. Yes, sir.

Q. The mistakes were made by your architect, they were called to your attention by Mr. Graham and you then recognized the mistakes and the setting plans had to be changed accordingly, didn't they?

The WITNESS: If you will let me read that letter to Mr. Graham, I will see what he says about the mistakes of the architect. The architect may have made a mistake in some way or other, but it was easy for a man like Mr. Graham going over this work as a whole to have picked up the mistake and corrected it himself. If the architect on the plans puts a distance of ten feet between two stones and they do not fill out in there, it would be an isometrical mistake that anybody could pick out that knew anything about the plans.

Mr. HARLEY: There is the letter (indicating) which you asked for.

The WITNESS: The question states that the architects made the mistakes. Will you read the question again?

(Question referred to was read by stenographer.)

(370) A. It says the mistakes were made by my architect. I do not admit that the architects made any mistakes, and if they did, it was not mistakes, certainly not more than one. I will read this letter from Mr. Graham: "Your calling my attention to the numerous corrections in course Z led me to think that you are under the impression they were caused by my mistakes. This is not so. I carefully followed the figures on the $\frac{1}{4}$" scale detail No. 156 and the F. S. D. portico cornice No. 166. On the latter the face of parapet wall is marked $1\frac{3}{4}$" back of frieze line, which corresponds with figures on the $\frac{1}{4}$" scale detail. The architects now figure it on the same face on the frieze; hence the change in all the dimensions." That was a matter of $1\frac{3}{4}$" in one item. This was a very small matter.

Q. You do not call it a mistake at all, then? A. No, probably the architects intended it that way. He called it a mistake, though.

Q. What did you mean by your reply to that letter in stating "in fact, the original drawing by the architects was

laid out that way, but got changed in the tracing by mistake. As to the corrections in course Z, I did not consider them as caused by any mistakes of yours." What did you mean? A. Well, he wanted to show that he had not make a mistake then.

Q. It was not a mistake then. A. No, you could hardly call it a mistake. It was a trifling thing that was very easily cured.

Q. Now, Mr. Green, I hand you letter dated August 26, 1907, signed Bernard R. Green. Is that your signature? A. Yes, sir.

Mr. HARLEY: I offer that letter in evidence.

The COURT: What is the date?

Mr. HARLEY: August 26, 1907. (Reading):

"Sir:

In answer to your letter of the 24th instant I have to state the setting plans for courses Z 4 and Z 5 therewith have (371) been received and have gone to the architects for check which is requested to be made immediately.

You ought to change the jointing to the new arrangement in the courses Z 2 and Z 3 and return the tracing to me for approval, before asking the blue prints for us.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. What do you mean by changing the jointing to the new arrangement? A. That referred to the lengths of a few stones in a course in which the lengths of the individual stones were changed slightly in order to make the joints line up with the joints of the courses above and below.

Q. Who made the new arrangement, you or Mr. Graham? A. We made it—I don't know I think Mr. Graham had it wrong on his plan and it was necessary to make a little change.

Q. Look at the plan and tell us what plan it was? A. Z 4 and Z 5.

Q. What is the number? A. I don't know: I can find it for you. One sheet is No. 12 and another sheet is No. 11.

Q. Now, show me the mistakes that Graham made, if you please. A. I did not say he made mistakes.

Q. I thought you said he did make it? A. I did not. I said probably he did.

Q. Don't you know as a matter of fact that you or your agents made the mistakes and as a matter of fact you had to make the new arrangement? A. No, there is a little trifle here that had to be straightened out.

Q. I understood that Graham had made the mistake. I now ask you to tell this jury with those plans before you one single mistake made by Mr. Graham as to those setting plans? A. I did not say he did; I said it was probable that he did.

Q. Show us where it is; and who made it? A. I don't
(372) know just where it is; there are some red marks here that indicate a slight change. Here are two stones that were changed into one stone (indicating).

Q. Well, who made the change? A. We made, I suppose. There are 100 stones on the plans and this is a matter of one or two of them.

Q. But that is not the new jointing arrangement, it it? A. I think it is. It looks like it.

Q. Do you know for what purpose the new jointing arrangement was made? A. I stated a while ago most of it undoubtedly was made to line the joints with those in other courses

Q. And that was not done by your architects in your original drawings? A. I don't know about that. Perhaps not. Perhaps he misinterpreted the joints by the lines.

Q. That is, perhaps your architect misintreepreted it? A. No, he would not be likely to misinterpret the very thing he made himself. If he had made these plans from his own drawings, he would have lined these joints up properly. Mr. Graham's men, or whoever made the drawings probably did not realize that the joints should be in a line with each other.

Q. You have the architects drawings in court? A. Yes, sir.

Q. And you have the setting plans in court? A. Yes, sir.

Q. You are invited to show where in any one of those setting plans Mr. Graham made a mistake. Can you do it? A. No. Possibly I could if I studied over the plans long enough. It is a complete piece of work and contains thousand of items of which these are only one or two; but after a little time, I may be able to pick them out. The architect could do it.

Mr. Hagley: Well, just take the plans then.

The Witness: In plan No. 11—

(373) Q. Is that what is referred to in the letter there, sir? A. I think it is.

Q. Here is the letter of August 26th? A. I should say from this letter which I wrote where I say that he ought to

change the jointing in the new arrangement to courses Z2 and 3, that some new arrangement had been made; whether it was a new arrangement made independently by the architect or myself with Mr. Graham, or whether it was the arrangement that should have been put in the plans originally by myself, I can not say.

Q. Don't you know as a matter of fact, that it was not made by Mr. Graham but by your office? A. I don't know that.

Q. I show you letter dated August 28, 1907, and ask you whose signature that is? A. My signature.

Q. That is your signature? A. Yes, sir.

Mr. HARLEY: I offer this letter in evidence (reading):

"Sir:

I return herewith approved your tracings of setting plans Nos. 11 and 12 for the south pavilion granite work of the Museum building.

You will also find enclosed a blue print of a little elevation showing a revised jointing of the south pediment after the arrangement which was made at your own suggestion.

It is the arrangement too that the architects made on their original layout, but which got reversed somehow in the tracing. Please follow this hereafter, as you notice you did not do it in plans Nos. 11 and 12,—which we have accordingly corrected.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Now, do you understand what that new arrangement (374) was? A. Yes, sir.

Q. Is it what you have already testified? A. Yes.

Q. Look at this letter dated September 5, 1907, and state whose signature that is? A. That is my signature.

Mr. HARLEY: I offer this letter in evidence, if your Honor please (reading):

Sir:

Your setting plans Nos. 13 and 14 of the south pavilion granite work of the National Museum building are sent you by this mail, in a separate roll, approved. You will notice that

the false jointing at the arched openings has been omitted, and that the two small stones 17 and 18 in course Z-7 south of east and west axis, have been made parts of 16 and 19 with false joints.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Look at the letter of September 7, 1907, and state whose signature that is? A. This is a letter received by me from Frank F. Graham.

Mr. HARLEY: I offer this letter in evidence, if your Honor please. (reading):

Dear Sir:

By this mail I have sent under separate cover Granite Setting Plan No. 15, showing course Z 8, also have returned for approval No. 10 Setting Plan with corrections in courses Z2 and Z3 made to conform with changed jointing in Front Pediment of S. Pavilion.

Yours very truly,

FRANK F. GRAHAM."

Q. Now, that changed jointing is what we have been talk-
(375) ing about? A. Yes, sir.

Q. Which commenced at setting plan 10 and extended up for several numbers A. Yes, sir.

Q. And that change was made by your office. Is that correct, sir? A. I don't know whether it was a change or a correction. It may not have been a change fundamentally about the plan.

Q. But don't you remember that in your own letter you stated that it was not Mr. Graham's mistake? A. Well, we have already talked about that. Yes, I understand that.

Q. Doesn't this letter refer to the same change? A. To the same correction.

Q. Who made this change referred to in the letter of September 5? A. That was made in correction of the plans evidently at the architect's office. It is not a change but a matter of correction. It is the sort of thing that should not have been in the plans in the first place.

Q. Ah, the original plan was wrong? A. In Mr. Graham's original setting plan it seems things in it that should

not have been put in are there. It was his mistaken interpretation of the original plans that he was to work by.

Q. Well, you have the plans right before you, show them to us? A. It is on plans 13 and 14. (reading): "You will notice that the false jointing at the arched openings has been omitted, and that the two small stones, 17 and 18 in course Z-7, south of east and west axis, have been made parts of 16 and 19 with false joints."

Q. You say that was some mistake of Graham's? A. A misinterpretation of Graham's of the original plan: it is a trifling matter.

Q. All right, show it to us? A. Here it is (indicating). These are the two courses shown on this plan, here is the course Z-7 and this is on the other side of the building (indicating on photograph). This is the south side and because of the contiguous walls the length is a little different between the pier there and this point (indicating). It was to put a joint in (376) that stone there showing a little chip of a stone which you could hold on your arm separate from the stone, and he marked it false joint. No possibly we did it. I don't know who did it.

Q. Don't you know that Mr. Graham did not do it? A. No, I don't think he did. I think we did it. That was less work for him, because he did not have to cut that stone through. That made him just run a little groove in there and saved him all that trouble.

Q. Well, he misinterpreted the original drawing. Show us that on the original drawing, please.

(The witness then left the stand and indicated on the plan.) That (indicating) is course Z-7 south of the east and west axis. Course Z-7 is this course here (indicating) running up to the arch. Now, this stone here is the one we are talking about. That stone there does not show any joint up there at all, while on this plan—that stone there was a trifle too long for the line jointing so they put a joint in there and sawed it in.

Q. But where on that original drawing is the point that was misinterpreted by Mr. Graham? A. Over there, apparently.

Q. Where. A. His misinterpretation was the lining of these joints here (indicating) it lays out the work here in so many feet and he has the line here and the arched stone which must be described as an arch according to the layout from which he is to make up his work—this has to come together here in a sensible way. That is the principle under which it was laid out and he misinterpreted the principle.

Q. That is in course Z? A. In course Z 7?

Q. That is what is called the Z course? A. Yes, sir; there are several of them.

Q. There is nothing on the original drawings to indicate any false joints? You admit that, do you not, sir? A. Not in that particular course. But there is enough on the plan to
(377) show the way it came out. The plans indicate that from the way the work is laid out that in working out the setting plans a joint like that should have been put there originally.

Q. You say it should have been put there originally but it was not? A. I say it would have been put there originally provided the work as it came out, being laid out in full size for the purpose of construction, happened to come so that such a joint under that principle would happen to fall there (indicating); that is a most trifling matter.

Q. It was trifling that it could not be approved until that false jointing was put in there? A. No, if he had not put that false joint in there at all we would not have minded it.

Q. But didn't you make him put it there? A. No, sir; we put in there ourselves.

Q. Look at the letter of September 13, 1907, and say whose signature that is? A. That is my signature.

Mr. Harley: I offer that letter (reading):

"Sir:

I have approved your revised drawing No. 10 and new drawing No. 15 of the setting plans for the south pavilion granite work of the Museum building, and send the tracing to you by this mail in a separate package.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction."

Q. I hand you drawing No. 20, Mr. Green, dated by the draughtsman October 11, 1907? A. Yes, sir.

Q. Have you the original drawing, showing that done,
(378) Mr. Green? A. Yes, sir.

A. *Yes, sir.*

Q. What does it show the diameter of that dome to be, that is the original drawing by the architect?

The COURT: Is it not a matter of admission that according to the dimensions of the original drawing, it was not quite as large in diameter as it was afterwards made?

Mr. HILL: There is no question about that.

Mr. HARLEY: It was a matter of over twelve feet, another one of those slight mistakes.

The COURT: It was allowed for in the $4,000. Can you tell from the original drawing there, what was the original dimension?

The WITNESS: I have not discovered it yet.

Q. (Mr. HARLEY) Do you know what the original drawings showed that diameter to be? A. The original drawings showed the diameter of the drum of the dome, the outside diameter, to be 80 feet.

Q. Now, look at No. 20 and state what it shows the diameter to be? A. It shows it to be 84 feet.

Q. How long after October 11, 1907, did it take you to approve that plan? A. It is marked here "Approved January 29/09."

Q. Then it was received by you and corrected when, January 29, was it not? A. It was approved. I don't know when it was corrected.

Mr. HARLEY: You remember the letter from Mr. Graham of October 4, where he says:

"Dear Sir:

In starting to lay off setting plans for Drum wall of Dome I notice a discrepancy between "Quarter plan through Triglyphs" on F. S. DD. No. 176 and the other drawings. The cavity (379) or hollow space in drum wall is figured 3' 10", making outer diameter of drum 80' 0", in all other contract drawings this space is figured 1' 10" and the outer diameter 84' 0". In this drawing (No. 176) architects call attention to a change of $\frac{3}{4}$" in height of Triglyphs but make no mention of this more important change. I therefore hope it is an error; otherwise I must ask you for an order for the extra work it will entail. Please let me know what to do in this matter as I am anxious to finish setting plans as promised.

Yours very truly,

FRANK F. GRAHAM."

Q. (Mr. HARLEY) Look at the letter which I now hand you and state whose signature that is? A. My signature. A letter to Frank F. Graham.

Mr. HARLEY: I offer this letter of October 9, 1907, from Mr. Green to Mr. Graham: (reading):

"Sir:

I have been away for two or three days and now notice your letter of the 4th instant, bringing up the fact that the granite drum of the dome of the Museum building has been made 84 feet instead of 80 feet in diameter.

This was done early in the period of the contract when the architects worked up the detail drawings and I knew of it at the time, but failing to call it to your attention then, I have not thought of it since.

It affects nothing but the circumference of the drum itself from the roof line to the top course D.Q. making the exterior or face circumference of each ring course proportionately longer. This will not affect the number of stones nor the rise of any course, because each stone, as shown in the general plans, will simply be made a trifle longer to correspond to the larger diameter, and the triglyphs, dentils, etc., also stretched correspondingly.

If you do this extra work, you would be entitled to pay for it. Please let me know for what sum you will do the extra cutting, freighting, etc., that this extra quantity of stone will entail.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

(380) "Copy of above letter sent to:

William Pirie, Inspector,
Baltimore, Md."

Q. Now, Mr. Green, do you know any way that Mr. Graham could make those detail drawings with accuracy before that was corrected? I beg pardon, I mean setting plans? A. No, not perfectly complete, that changed a few figures on the plans which he might have already made, if he had made them.

Q. What difference did that make in the circumference, Mr. Green? A. Why, the diameter was increased four feet and that would make an increase in circumference of about 3 1/7 times four feet—pi, as we say.

Q. Well, pi multiplied by 4 makes over 12 feet in circumference? A. Yes, sir.

Q. Which you increased that dome in size? A. Yes, sir.

Q. Will you tell the jury how it took you from the early part of October until the 29th day of January to approve that? A. I don't know how long we had it. I don't know when we received it. This shows the date when it was approved. Somebody has put on here—I don't know who did it—it looks like it was done by Mr. Graham's office. "Corrected January 24th, 1908". I don't know who put that on or when it came to my office, but I see it came to my office and was signed by me January 29.

Q. Will you explain how Mr. Graham was responsible for the delay between October 11 and January 29? A. I don't know. I don't know whether he was responsible or not.

Q. Was it Mr. Graham's mistake in anyway?

The WITNESS: What?

Mr. HARLEY: The circumference of the drum of the dome?

(381) A. No, sir.

Q. Then, could he in any way be responsible for any of that delay which was occasioned on that drawing? A. I don't know what you mean by delay. I can not answer that. I don't know what delay those dates represent.

Q. Haven't you testified on direct examination that the setting plans were much delayed? Haven't you, sir? A. They were much delayed in being presented at my office, yes.

Q. Will you explain how they could have been properly presented to your office until that change was brought to their attention? A. They could not have introduced that change until they heard of it. The only thing that had to be done on the plan, though, was to change a few figures on it. The same plan would have answered the purpose.

Q. Why didn't you put it on the original drawings? A. Because we changed it afterwards.

Q. The *dome* you put on there first would have dropped down in the building, wouldn't it? A. No, sir.

Q. Can you tell me how it would have fit it there if it needed 4 feet additional? A. It was too big to slip down in the building.

Q. At 80 feet it would have struck up there the same way? A. Yes, sir; it certainly would.

Q. Do you mean to say that the building was so erected up to that point that you could have put on either a 80 feet or

84 feet deep, without any change? A. No, it was not erected that way up to that point. The erecting of the building had nothing to do with the preparation of these plans for the stone work.

Q. Don't you know that was a change made by you and by your people for which Grafton was not responsible? A. (3824) Yes, of course, I know that.

Q. And you know that any delay on that setting plan was due to that fact, don't you? A. No, I don't know that.

Q. You can not say that? A. No, I don't know when he made his setting plan. I don't know when he made it. I know that we did not get it.

Q. Do you mean to say that you did not get it before January 29? A. No.

Q. Do you mean to say that you did not get it in the month of October? A. I don't know; I can't tell you that.

Q. Look at this letter of October 5, 1907, and say whose signature that is? A. That is my signature; yes, sir.

Mr. HARLEY: I offer that letter in evidence. I will read it to the jury. (Reading):

"SIR:

I am returning to you, in a separate package, tracings of setting plans Nos. 16, 17 and 18, and supplement to No. 2 setting plan consisting of portion columns, approved. You will observe that the changes in the stone jointing have been made, which affect the lines of the stone and their wall bearing. Please see that you understand these and let me know if, in your opinion, they may not be good and correct.

In this connection, I wish you would observe stones 16 and 19, Course Z, drawing No. 14. To make the false joints in these stones line with those in corresponding courses above, the false joints should be placed at 6 ft. from the angle instead of 7 ft.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Q. Now, I will ask you to look at the letter of October 25, 1907, and state whose signature that is? A. That is my (3825) signature.

Mr. HARLEY: I offer this letter. (Reading):

"Sir:

We are now printing and will forward to you tomorrow tracings of setting plans Nos. 23 and 24, approved by me, for the Museum south pavilion granite work.

Please notice that on drawing No. 20, which was approved and sent to you a few days since, the pairs of stones in parapet course in the octagon angles of the pavilion, namely, Nos. 2 and 3, 12 and 13, 16 and 17 and 20 and 21, should each be cut in one stone, which would then conform to the original detail drawing No. 156. It appears that you have made them in two stones, and, in checking up, we failed to notice it. I am writing to the Thompson-Starrett Co. to quarry these stones accordingly.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Copy of above letter sent to:

William Pirie, Inspector,
Baltimore, Md."

Q. Then, as a matter of fact, you had originally approved that drawing sometime before October 25, had you not? A. Probably that is the proper deduction from the reading of that letter.

Q. Are the parapet stones and courses there? (indicating) A. Yes, certain parapet pieces are shown on the plan (indicating).

Q. There can not be any doubt about that? A. No, one is here (indicating) the south and west pediments—there are four of them.

Q. Well, look at this letter, Mr. Green? A. This bears my signature under date of January 21, 1908, and is address-
(3841) ed to Mr. Graham.

Mr. HARLEY: I offer this letter of January 21, 1908, (reading):

"Sir:

I return by this mail, in a separate roll, checked and approved your substitute tracing for setting plan No. 20 for the south pavilion stone work for the National Museum building, which Inspector Pirie brought over last week, and have retained the original tracing for which this is the substitute.

I enclose also blue print of the two little openings to be left in the dome drum at the roof line at the northwest and northeast angles, which are shown on the original plans but were inadvertently omitted when you made up the setting plans.

As soon as Mr. Pirie gives me the list of the few small pieces of stock to cover the work in the corrected sheet No. 20, I will order them from the quarry.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction."

Q. Now, look at supplement No. 2 and state what that is, Mr. Green? A. This is a supplementary drawing of setting plan No. 2. It was prepared by Mr. Graham. It was sent to my office, received September 30, 1907. It was checked up by the architects and returned again to our office on October 5, 1907, and approved by me on the same day. It represents a plan and elevation of the five columns, that is, the independent columns on the front of the building, of which there are eight in number. That was a supplement to the setting plan prepared by Graham.

Q. Mr. Green, they were prepared in accordance with your request, I believe. A. I don't remember whether we made particular request for them or not. It might have been thought desirable to have these prepared that way for the purpose of carrying on his contract. I don't know why I should request them, because I was not carrying out the contract, he was doing it.

Q. What benefit was it to Mr. Graham to know or to have the information contained in there? A. I don't know pre-
(385) cisely.

Q. Don't you know precisely that the request was made from your office and that it was promptly complied with? A. I don't remember, sir.

Q. Now, Mr. Green, referring to the setting plan, see whether this is not correct. Didn't you make changes from the original drawings on No. 2 setting plan? A. I don't remember, maybe we did.

Q. Didn't you make them on No. 7 A. We made some changes there, yes, indeed.

Q. And that was the one received by you on March 20, and not finally approved until August 20? A. We had it no before us several times and I think [illegible] times during that time.

Q. It was received at your office on March 20 and not checked up by you on April 29 and was not finally approved by you until August 20. That is correct, is it not? A. I think so, according to the face of the plan.

Q. And you made changes on No. 20, I believe, is not that correct? A. I don't remember.

Q. (Mr. HARLEY) Did you ever communicate to the Regents of the Smithsonian Institution the changes made by you in setting plan No. 20?

Mr. HILL: We object to that. That is not a matter of cross-examination. If they wish to prove that, they can put (386) Elmon as their own witness later.

(After argument.)

The COURT: Do you think that the fact that from time to time as changes were made in the length or depth of stone that would be evidence of bad faith?

Mr. HARLEY: I think if Mr. Green has plans calling for the diameter of the drum of the dome at 80 feet and he changes it to 81 and he does not communicate the fact to the Regents of the Smithsonian Institution the Regents then have not the information on which to act.

The COURT: Well, I deny the validity of that defense. As I understand it, they had the inside measurements and they should have been the outside measurements. Now that inadvertence there was discovered and was corrected, and I certainly can't see how that can be a matter to be submitted to the regents for their approval. It was a mistake of substituting inside measurements for outside measurements.

Mr. MCLANAHAN: I think your Honor has that the least bit wrong. That drum to the dome was a change. The original plan called for 80 feet diameter all the way across. That was changed and we can show when it was changed and when it was called to the attention of Mr. Graham. The rest of it is, as you say, simply trifling changes in various stones throughout the building. No. 7 of the specification provides "figures on the drawings are to be taken wherever they occur in preference to scale dimensions. All explanations and notes on the drawings are to be considered a part of the drawings and used as such."

(After argument.)

The COURT: What is the last question, Mr. Stenographer?

(The last question was then read by the stenographer.)

The COURT: Is that objected to?

Mr. HILL: Yes, sir; it is.

The COURT: I sustain the objection. As I understand the state of facts relied upon by the plaintiff is that Graham abandoned the work and abandoned it and thereupon annulled the contract. They have not set up any complaint that by reason of delays the contract was in default.

But the said question was objected to by plaintiff's counsel and the Court sustained the objection and (387) refused to permit the witness to answer the same.

To which action of the court in sustaining the objection to the said question offered and propounded and in refusing to permit the witness to answer the same, the defendants, and each of them, then and there excepted and prayed the court to sign and seal this, their twelfth bill of exceptions, which is accordingly done, this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Thirteenth Bill of Exceptions.

After the matters set forth in the defendants' aforesaid bills of exceptions, all of which are hereby incorporated in and made a part of this, their thirteenth bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

The witness, BERNARD R. GREEN, still under cross-examination.

Mr. HARLEY: We have shown and will show that these changes on the part of the Government have caused the delays and we think it was necessary for the Regents of the Institution to know that these changes had been made and that these changes caused this great delay.

The COURT: The Government has not complained that the contract was broken because of delays.

Mr. HARLEY: The breach of the contract was by the Government. What is the trouble, gentlemen?

Mr. HILL: We are simply laughing at the last statement you made.

Mr. HARLEY: That is not half as ludicrous as your bringing (389) ing this suit.

Q. I want to ask you, Mr. Green, whether you have communicated to the Regents of the Smithsonian Institution the long delays that were occasioned by you and your office in approving the setting plans submitted by Mr. Graham?

Mr. MCLANAHAN: We object to that. The facts are that Mr. Graham himself refused to complete the work and the Government had nothing else to do than to go on and complete the work itself.

The COURT: I sustain the objection.

But the said question was objected to by the plaintiff's counsel, and the court sustained the plaintiff's said objection and refused to permit the witness to answer the same.

To which action of the court in sustaining the objection to the said question offered and propounded and in refusing to permit the witness to answer the same, the defendants, and each of them, then and there excepted and prayed the court to sign and seal, this to be their thirteenth bill of exceptions, which is accordingly done, this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Fourteenth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this their fourteenth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

To the witness, BENJAMIN R. GREEN, still under cross-examination:

Q. (Mr. HARLEY) Did you communicate to the Regents of the Smithsonian Institution the fact that you had made numerous and material changes in the plans for this building?

Mr. MCLANAHAN: We object on the same ground.

(389)

The COURT: I sustain the objection.

But the said question was objected to by the plaintiff's counsel, and the court sustained the plaintiff's said objection and refused to permit the witness to answer the same.

To which action of the court in sustaining the objection to the said question offered and propounded and in refusing to permit the witness to answer the same, the defendants, and each of them, then and there excepted and prayed the court to sign and seal this, their fourteenth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Fifteenth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their fifteenth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

To the witness, BERNARD R. GREEN, still under cross-examination:

Q. (Mr. HARLEY.) Did you communicate to the Regents of the Smithsonian Institution the fact that you were responsible for delay in approving these plans?

(Objected to; objection sustained; exceptions noted.)

But the said question was objected to by the plaintiff's counsel, and the court sustained the plaintiff's said objection and refused to permit the witness to answer the same.

To which action of the court in sustaining the objection to the said question offered and propounded and in refusing to permit the witness to answer the same, the defendants, and each of them, then and there excepted and prayed the court to sign and seal this, their fifteenth bill of exceptions, which is accordingly done, this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Sixteenth Bill of Exceptions.

(390)

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in

and made a part of this their sixteenth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

To the witness, BERNARD R. GREEN, still under cross-examination:

Q. (Mr. Harvey.) Now, Mr. Green, this contract was made October 28, 1906, right before the winter set in. You approved the first plans December 21, I believe. Now, you were away in December about how long? A. I was away in December from about the 6th until the end of the month.

Q. You were away in February about how long, that is, February, 1907? A. I was not away at all, that I remember, except perhaps a day or two. I was not away at all in the sense that I was away in December.

Q. You were away in April and May, 1907, for how long, please state? A. Throughout the month of April and about half the month of May.

Q. About how many altogether? A. About six weeks.

Q. And you were absent about three weeks in December and that makes nine weeks. A. Yes.

Q. Now, how much longer were you absent before October, 1907? A. I don't remember.

Q. You went to Europe in 1907? A. I did.

Q. That was this six weeks' trip which you have referred to? A. No.

Q. Well, when did you go? A. I went the middle of March.

Q. The middle of March and returned when? A. The middle of May, that is more than six weeks.

Q. Then you made a mistake when you stated that you were away only about six weeks? A. I did not say that. You asked me how much time I was away in April and May and I said I was away all of April and half of May.

Q. Then in those eleven months in which he had to perform his contract you were away three weeks in December and you went to Europe when? A. The middle of March.

Q. And you return when? A. The middle of May.

Q. How many weeks was that? A. About eight or nine.

Q. And three weeks makes twelve. So, in the eleven months you were away about twelve weeks? A. Yes, sir.

Q. Now, Mr. Green, you have the setting plan No. 1 there before you. That was approved when, if you please? A. I don't think I have No. 1 here, you had better look over your collection and see if it is not there.

Q. When did you approve that plan? A. I don't know just when I approved it. It is not marked on here. This is the first plan of the set and I didn't happen to write it on that.

Q. Your letter of December 21, refreshing your memory, states that you approved it, that is December 21, 1906. Now, Mr. Green, who had charge of the shipments of the stone from the quarry to Baltimore, who is one of your inspectors? A. The inspectors did not do the shipping.

Q. Who countersigned the invoices? A. The inspector, I suppose.

Q. What was his name? A. Mr. Bailey.

Q. Don't you know, as a matter of fact, that he had instructions from you to countersign cards and every invoice? A. I think he did. I would say he did have. I don't know just how we gave him instructions.

Q. Now, getting plan No. 1 embracing courses A, B and C, I believe? A. Yes, sir.

Q. Do you know when that stone for those courses was delivered to Mr. Graham? A. I don't know exactly.

Q. Your man Bailey, you say, countersigned the invoices? A. I believe he did.

Q. Look at this invoice which I now hand you and state whether or not that is the Bailey you have referred to? A. Q. And checked by— A. Wheeler. I should think that was. I presume it is; it simply says "checked by Bailey."

Q. Now, state whether or not that is the invoice to which you have referred? A. I don't know. I don't know what it is, except that I can read it for you or you may read it yourself, just as you please.

Q. You know that is Bailey— A. I don't know whether that is Bailey or not.

Q. You know that he is the man who countersigned these invoices? A. He was the man who was expected to do it.

Q. He was there for that purpose? A. That was one of his duties.

Q. That is an invoice from that quarry? A. I should think it was.

Q. Does it refer to stone used in the National Museum (393) building? A. I don't know.

Q. Look at it and see? A. I don't see anything that shows it is that particular stone.

Q. Does it refer to the National Museum building stone at all? A. I don't see that it does.

Q. See if you can find B-7 on that plat?

Q. Mr. Green, look at the invoice which I now show you for a shipment on car, Central Vermont No. 9,690 and state

what it is? A. I never saw it before, but it is headed "E. E. Ellis Granite Company, shipping invoice, Bethel, Vermont;" and it is filled in "July 11, 1907". It is addressed to or pretends to be on account of—I don't know what it means Frank F. Graham, No. 1,856, Baltimore, Maryland. I suppose that it what is there, and the figure 21 is in pencil mark.

Mr. McLANAHAN: He has stated that he don't know what it is and that he has never seen it.

The COURT: But he is only stating what is on the face of the paper.

Mr. McLANAHAN: We object to it.

Q. Does it refer to the quarry from which this granite was quarried?

(Objected to; objection overruled; exception noted.)

A. It does not refer to any quarry. It has the name on the head "E. E. Ellis Granite Company, shipping invoice, Bethel, Vermont."

Q. E. E. Ellis were the owners of the quarry from which this granite was taken? A. I believe they were originally the owners.

Q. And the Thompson-Starrett Company was the lessee? A. Yes, I believe they were.

Q. Don't you know that correctly represents the shipment from those quarries to Mr. Graham of some of that stone? A. I don't. I might guess at it like anybody else. I could bet on it, even.

Q. You could bet very seriously that that was a shipment from this quarry of some of that granite? A. No, sir; I would not bet very high. It would depend with whom I was betting.

Q. Do you know how much granite is represented in No. 1?

The COURT: Do you mean how many tons?

Mr. HARLEY: It is reckoned by cubic feet.

(394) A. I have not computed it.

Q. But you have the computation somewhere? A. We have it somewhere.

Q. Let us see how much it is.

Mr. McLANAHAN: We will put this testimony on by the man who knows all about it. Let my brother ask him if he made the computation himself. We object.

The COURT: The objection is sustained.

Mr. HARLEY: We note exceptions.

(Objected to; objection sustained; exception noted.)

Q. Do you know how many cubic feet are represented in these three courses? A. No, I have never looked at the plans with that object in mind. If I looked at it awhile I might be able to tell. It is strung out all over this sheet here. If it had been made in a sensible way possible you could get that in more quickly.

Q. But you don't know? A. No, sir.

Q. Do you know how many are represented in Number 2 and 3? A. No, sir; not without counting them.

Q. Do you know how long it required the Government to deliver to Mr. Graham the stone represented in those first three setting plans approved by you on December 21? A. I do not. The Government did not deliver it except putting it on board the cars at the quarry.

Q. Don't you know that it was more than seven months after the approval of these plans, before you delivered those stones to Graham? A. I don't know; but I don't believe there were many of those stones behind the eleven months.

Q. Seven months I said? A. Well, seven months. There may have been just a few that were not delivered.

Q. Take four and five; you approved those on January (395) 22nd, I, J, K, L, M, and N. A. I don't think I have 3, 4 and 5 here.

Q. Can you tell from memory what courses they represent? A. No, sir.

Q. They were approved by you on January 22nd, you have stated. Do you know when you delivered the stone represented in those two setting plans to Mr. Graham? A. I do not.

Q. Don't you know as a matter of fact that they were not entirely delivered for more than nine months after January 22nd? A. No, I don't know that; I don't believe but very little of it—

Q. Don't you know that that stone represented in those two setting plans was not delivered to Mr. Graham for more than nine months? A. No, sir; I don't know.

Q. Don't you know as a matter of fact that there was a great delay in the delivery of the stone for those two setting plans? A. No, sir; I don't know that.

Q. Don't you know that the Thompson-Starrett Company was quarrying other stone for you and did not quarry that for several months after the plans were delivered to you? A. No, sir; I don't know that.

Q. You mean to tell it is your that you don't know that that quarry was busy on other stones for you and that that business delayed this man? A. I don't know that. I have no doubt they were working on other stones for the building, as you say, but only to a small extent. It did not affect the work on this job.

Q. Did not affect it? A. It should not have affected it. I knew in a general way what was going on, because I was in communication with my foremen and the men on the job.

Q. You know that in the summer of 1907 very little had been done on this Graham work, didn't you? A. I know that little had been done, to my judgment it was little.

Q. Although these five plans had been approved to you on January 22nd. Now, take No. 6, have you No. 6? A. (Same.) Yes, here it is.

Q. That represents what courses? A. O, P and Q.

Q. Do you know when that stone was delivered by the Government to Mr. Graham? A. I don't know.

Q. Don't you know that that was very seriously delayed? A. Delayed from when?

Q. Don't you know that the quarrying of that stone by the Thompson-Starrett Company was very seriously delayed? A. No, I don't.

Q. You never heard anything about that. A. I heard sometimes that some stones was wanted and had not arrived.

Q. Don't you know that the last of those stones did not arrive until the end of October, 1907? A. No, sir; I cannot answer that.

Q. More than eight months after they were approved? A. It may be that the last one was not delivered until then, but there is every reason to suppose that the rest was delivered sometime before that. There are a great many stones shown on the plan and running over that quickly they may have been strung out and delivered over many months.

Q. Don't you know that those six plans represent between fourteen and fifteen cubic feet? A. I do not.

Q. Don't you know that those six plans approved respectively December 21, January 22nd and February 6th, represent more than fourteen thousand cubic feet? A. I don't know that, no, sir.

Q. Do you know when the stone represented by these six plans—do you know when you delivered that to Mr. Graham? A. I do not.

Q. Don't you know that it was not delivered until October 1, 1907? A. I don't know positively.

Q. Didn't you receive information from your accredited agent that the stone for those six plans, the last of which was approved February 9, was not delivered until October 1, 1907? A. I don't know that; I know that some of the stone was delayed in a general way because I knew what was going on by my report from my people, but the great mass of the stones may have been delivered long before that. It is a matter of record and the stones came in at different times. They were of various shapes and sizes and they did not all come in at the same time. It took sometimes to ship them and it took sometime for a car to get from Bethel to Washington or Baltimore on a freight train. Sometimes it took more than a month coming down.

Q. But taking those six plans representing seventy cubic feet, don't you know that you did not deliver before October 1, 1907, within 1,500 cubic feet of the amount shown by those plans? A. I don't know. That is fifteen hundred out of fifteen thousand.

Q. I mean that there fourteen or fifteen hundred cubic feet furnished and that only about twelve thousand were furnished.

The Court: Strike those statements out.

Q. You know there was a great delay in delivering those stones to Mr. Graham? A. I don't know that there was such a serious delay, coming up within fifteen hundred feet on fifteen thousand was pretty close.

Q. You think a delivery of 12,500 cubic feet from December 21, 1906, to the 1st of October, 1907, was coming up pretty close, do you? Supposing that the plans, 1, 2, 3, 4, 5, and 6 represent 14,206 cubic feet and that you shipped to us by October 1, 1907, only 12,579 cubic feet, wouldn't you consider that a very serious delay? A. I think under all the circumstances it was slow. I will that show. But there were a number of circumstances.

Mr. McLANAHAN: There has been nothing here, if your Honor please, to show when it was delivered and that question (398) is based on two facts not proven first that there was twelve thousand and some odd feet delivered, and second that it was not delivered until October 1st.

The Court: I will admit it subject to exception.

Q. (Mr. HARLEY) Referring to those plans, Mr. Green, and assuming that they represent 14,206 feet, you do not think they ought to have been delivered to us, say within a month—you do not think they should have delivered the fourteen thousand within a month? A. No.

Q. (Mr. HARLEY) How you think it ought to have been delivered within two months? A. Within two months from what?

Q. From December 21, when you approved the plans.

Mr. MCLANAHAN: But No. 6 was not approved until March or February.

Mr. HARLEY: February 9th.

Mr. HARLEY: I want to make an objection to all this line of testimony. We have introduced no testimony yet, but we intend to introduce testimony later as to the delivery of this stone. Now, the purpose of this would be to try to make the gentlemen of the jury think that we had delayed in shipping this stone. These questions are asked obviously with that intention, but the only possible ground would be to show what Mr. Green knows as to the delivery of the stone. He has stated, however, that he knows nothing about the delivery of the stone at all and this is being used to test the credibility of the witness. We think it is improper and ask that all these hypothetical questions be stricken out. They refer to a state of facts which do not exist as far as this witness is concerned.

The COURT: I sustain the objection to the last question. The plan which you last asked about was not approved until (599) February 9.

Mr. HARLEY: 1, 2, 3 were approved December 21, and 4 and 5 were approved January 22nd, and the sixth one on February 9th.

Q. Now, I want to ask you whether taking into consideration the dates of the approval of those six setting plans, you should not have delivered the stone to us two months from the respective dates of approval of said plans? The stones represented in those plans?

Objected to. Taken subject to exception.

A. I don't think it should have been expected to have been delivered, all of it, every stone on those plans, within two

months. It was winter season and conditions were very unfavorably to quarry and shipping.

Q. They can not do much at the quarry in the winter time? A. What was that?

Q. I say, that you cannot do much at the quarry then, in the winter time, is that correct? A. You cannot do as much ordinarily as in the summer time.

(399) Q. They are pretty well tied up in the winter time? A. Yes, sir.

Q. How is it at the stoneyard? Mr. Green, as a matter of fact, can the stonecutters in Washington or Maryland work with any degree of efficiency in the winter time? A. Yes.

Q. Can they work with the same degree of efficiency as they can in the summer time? A. Taking the whole winter through and the summer all through, they probably cannot.

Q. Don't you know that there is a very, very great difference in point of efficiency between summer work and work in the winter time? A. Here in Baltimore or in Washington?

Q. Yes. A. I think they can work nearly as well.

Q. In the winter? A. Yes, we all know what the weather is here.

Q. As a matter of fact, did not Mr. Graham complain to you frequently and personally of the delays in delivering this stone to him? A. Not with frequency; but he complained to me three or four times, perhaps.

Q. Do you know how many times? A. I don't remember; probably three or four, I suppose.

Q. Didn't he tell you that he was getting comparatively little stone all through the summer of 1907 and that that was ruining him? A. No.

Q. He didn't tell you that? A. No.

Q. Mr. Green, I believe I have asked you whether Mr. Graham did not complain to you frequently of delay on your part in delivering to him the granite for the cutting? A. He (400) did not frequently complain, no. He did complain to me.

Q. How many times, do you remember, sir? A. As I said before, perhaps three or four; I do not remember precisely.

Q. Didn't he complain to you in the spring of 1907, of this delay? A. I think he did.

Q. Didn't he complain to you several times in the summer of 1907 of this delay in delivering to him the granite for the cutting? A. He never spoke to me when he came over to see me, perhaps once or twice. I do not think it could be called several times.

Q. Didn't he ask you to substitute Mt. Airy granite which was being used on the same building in order that he might

get it more promptly? A. I do not think he did. However, I am willing to admit that he probably did. I could not say.

Q. Didn't you get after the Thompson-Starrett Company for delay in delivering this granite to Mr. Graham? A. Yes, about for delays. I asked them to expedite it as much as they could, of course, trying to push the thing along for Mr. Graham's benefit.

Q. Didn't you threaten to sue them for delay in delivery of granite on this contract? A. No, sir.

Q. Never got to the hands of counsel? A. No, not to my knowledge. At least, I didn't do it.

Q. You do not know that complaint was made and that on account of that complaint Thompson-Starrett Company was threatened with suit for this delay? A. No, sir.

Q. Do you know Mr. Penfield of Washington? A. I do not; that is, I do not know that I do.

Q. You haven't any recollection of him as counsel for the Thompson-Starrett Company? A. There was a young man by the name of Penfield, I believe, counsel for them.

(401) Q. Now, you remember him? A. I met him one time, I believe. I do not know much about it.

Q. Now, that you have refreshed your memory, don't you remember that you did threaten to sue the Thompson-Starrett Company for delay in delivering this Graham stone?

Mr. McLANAHAN: We object to the question as we cannot see that it is proper cross-examination. We cannot see that it is material to this case at all whether or not they threatened to sue the Thompson-Starrett Company. The mere fact of the threat of a suit doesn't show that the Thompson-Starrett Company people were slow in delivery. I do not think it is relevant and therefore I object to it.

Mr. HARLEY: I do not care to argue it.

The COURT: I think he can ask him the question.

(Question repeated.)

(Exception noted.)

(402) A. I do not remember it; I did not do it.

Q. The Thompson-Starrett Company was a competitor with Mr. Graham for this very work, wasn't it? A. They made a bid on it.

Q. On this very work? A. Yes.

Q. And then the Thompson-Starrett Company for you had to furnish the stone to Mr. Graham? A. Under their contract.

it was in their general contract to furnish this stone when we might need it.

Q. And the Thompson-Starrett Company had a contract for furnishing you other stone on the same building? A. Yes, sir.

Q. Now, Mr. Green, isn't it a fact that the shipments of stone by the Thompson-Starrett Company all through the spring and summer of 1907 were very light?

(Objection; objection sustained—exception noted.)

Q. Don't you know that very little stone was delivered by you, or by the Government, to Mr. Graham on account of this contract during the spring and summer of 1907?

(Objection; objection sustained—exception noted.)

Q. Don't you know that the great mass of stone was dumped on Mr. Graham in the winter of 1907 and 1908 so that it was impossible for him to work? A. I do not know that any such thing was the fact; in fact, I rather know it was not the fact.

Q. You know that the great mass of the stone called for in this contract was not delivered to Mr. Graham in the fall and (403) and winter of 1907 and 1908? A. I know that it was not.

Q. Don't you know— A. I say that I know that such a mass as that was never delivered to him.

Q. You know that in the winter of 1907 and 1908, Mr. Graham's yard wasn't piled up with a mass of stuff shipped to him by the Government through you? A. I do not know that it was excessively piled up as described.

Q. Do you know about how much stone was delivered to Mr. Graham in October of 1907?

Mr. McLANAHAN: If your Honor please, we object to this on the ground, as we did a little while ago, of repetition. He asked Mr. Green how much stone was delivered there and we had the discussion about the 12,000 feet and the witness said he did not know. It is going over the same thing again.

The COURT: Objection sustained.

(Objection sustained—exception noted.)

Q. Don't you know how much, or about how much stone was delivered to Mr. Graham on account of this contract in

the month of November, 1907? A. I do not know that precisely.

Q. Do you know about how much was delivered in the month of December, 1907? A. No, sir.

Q. Don't you know that none was delivered in November and December of 1907, then had been delivered up to the 1st (404) of October, 1907? A. I do not know.

Q. You have stated that the stone weren't named on Mr Graham? A. I do not know that.

Q. Haven't you stated that you did not know that it was not the case? A. No, I said that I did not know it was the case, but that I rather believed that it was not the case.

Q. Did you come over here in March of 1908? A. I do not remember; probably I did.

Q. At that time, wasn't the quarry shipping to Graham a large number of car loads of this granite? A. I do not think they were. He was complaining that he didn't get the stone, so they could not have been shipping very much.

(405) Q. You did not find that to be the case? A. No, sir.

Q. You did not find that state of facts when you came here in March of 1908? A. March, 1907, I thought you said.

Q. Weren't you here in the month of March, 1908? A. I do not think I was; I do not remember.

Q. You were abroad in March, 1907, weren't you? A. Yes, part of March.

Q. About March? A. The last half of March, as I have already said.

Q. Were you here in March, 1908? A. I do not think I was; I do not remember.

Q. You do not remember? A. No, sir; I do not think I was.

Q. You do not think you were? A. No, sir.

Q. Were you here in the spring of 1908? A. I do not remember; I do not think I was.

Q. When did you commence setting this stone in Washington, Mr. Green, do you remember that? A. Not precisely, no, sir.

Q. About what time, then? A. I do not think I can tell you that. We were working on the building generally, but just when we sent the first stone that belongs to this contract, I could not say.

Q. Wasn't it towards the end of 1907? A. I can not state positively because I do not know exactly.

Q. I did not ask you exactly, Mr. Green. Don't you know that you didn't commence until toward the end of 1907? I did not ask you to state the exact day or the exact month. A. (406) I do not know positively; I am willing to say that I believe we must have done some setting before the end of 1907.

Q. Plenty of cut stone piled up ahead in Washington, wasn't there?

(Objected to; sustained; exceptions noted.)

Q. Mr. Graham had cut all the brackets that showed around the portico there, had he not? A. What do you mean by the brackets?

Q. The medillion cords, Mr. Mason tells me that it is.

The COURT: What time do you refer to?

Mr. HARLEY: That was under this contract, if your Honor please. It was before Mr. Green took the work over.

A. He had cut a good many of them, but whether it was quite all or not, I do not know. These little medillions are little ornamental pieces right under that piece of cornice there on the portico. That was sort of carving work, it is carving work, but it belonged to Mr. Graham's contract, and he had some men working on this little stone.

Q. It was the most costly work under this contract, was it not? A. More costly per unit of stock, yes, sir.

Q. Did you communicate to the Regents of the Smithsonian Institution at any time the fact that the Government has not delivered to Mr. Graham with promptness the granite f. o. b. in net dimensions, at the quarry in Bethel, Vermont?

Mr. HULL: We object to that on two grounds. In the first place, there is no testimony that the Government did not deliver it with promptness and in the second place, the contract doesn't call for that being done.

The COURT: Objection sustained.

But the said question was objected to by the plaintiff's counsel, and the court sustained the plaintiff's said objection and refused to permit the witness to answer the same.

To which action of the court in sustaining the objection to the said question offered and propounded and in refusing to permit the witness to answer the same, the defendants, and (107) each of them, then and there excepted and prayed the court to sign and seal this, their sixteenth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Seventeenth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bill of exceptions, all of which are hereby incorporated in and made a part of this, their seventeenth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

The witness, BERNARD R. GREEN, still under cross-examination.

Q. Mr. Green, tell the gentlemen of the jury what you mean by net dimension blocks? A. Net dimension blocks?

Q. Please, sir. A. Net dimension block is a block of stone that is large enough to cut out of it the desired stone that is intended to be used when finished according to the drawing and design.

Q. Net dimension then means what? A. What I said.

Q. What is that? A. It means a stone large enough to cut out from it the desired finished stone.

Q. Suppose you were to cut out a stone containing one cubic foot, that is one foot in each of the three directions, would you say that the stone containing two cubic feet was net dimension block? A. I think it would be for that size stone; (108) it might equal a net dimension. It might be called a net dimension block.

Q. Now, if the stone were two cubic feet, two feet in each direction, would you say a stone three feet in each direction would be a net dimension block? A. Pretty near it. It is a matter of judgment only. That depends on the shape of the stone. Stones split out of a quarry come out in irregular shapes and in all different sizes. In quarrying stones for two feet square block, take that as an example, if you will, you would not have any two of them alike in dimensions in one way or another, perhaps three or four ways, when you had to begin cutting on it to cut out the particular stone desired.

The quarrying out stones is a very rough and irregular proceeding so far as the dimension of the stone is concerned. The quarry is an irregular mass of material split in all sorts of directions, and in all sorts of shapes, from triangulars to squares and other imaginable shapes with no two stones alike. A net dimension is a dimension of stone that is somewhere near, as may be practicable to get from the quarry reasonably, and as is usually the case, a stone that out of which the stone-cutter can cut the desired stone, and that the stone is big enough to do that. If it happens to be scant, he can not increase the size of it by cutting on it. Part of his work is to make the stone smaller.

Q. Do you mean to say, Mr. Green, that you furnished this granite to Mr. Graham in net dimension block? A. I do.

Q. Gentlemen, I called for the production of letter of June 19th, 1907, from Mr. Piric to Mr. Green.

Mr. HILL: We have no such letter.

Q. Isn't a net dimension block mean, Mr. Green, one that is reasonably near the net dimension into which that block is to be cut? A. Yes, it is to be reasonably near.

Q. That is all that means? A. It means reasonably near and the reason to be governed by the conditions surrounding the particular work you are engaged upon.

Q. Look at this memorandum which I hand you and state in whose handwriting that is, just examine the whole letter.

Mr. HILL: Your Honor, we object to the offering of this paper.

The COURT: It will come in subject to exception.

Mr. HILL: Will your Honor overrule our objection personally on the production of this and then we will note an exception.

The COURT: It has not been proven as yet.

Mr. HILL: We object to it on any ground.

Mr. MCLANAHAN: We do not think it is proper Cross Examination. This is a letter purporting to have been written by Mr. Piric and now if my brother wants Mr. Piric's opinion let him put him on the stand and ask him, but I do not see how asking Mr. Green what is his opinion on this thing, on Cross Examination, is relevant. He is now trying to get an admission, practically an admission from Mr. Piric, out of Mr. Graham. We do not think that is the proper method of offering this proof.

The COURT: Objection overruled.

(Exception noted.)

Q. Whose handwriting is that, Mr. Green? A. It looks like Mr. Piric's writing.

Q. Did you ever receive a report of that character from Mr. Piric? A. I do not remember that I did as far as I can

make out in looking this over. It is unfamiliar to my recollection.

Q. That is unfamiliar? A. It doesn't seem to be a complete letter.

Q. Mr. Tiers, you have stated, was your inspector in charge of the Graham work at Baltimore? A. He was Inspector of the stone cutting there.

Q. Didn't he report to you on several occasions that Mr. Graham was not getting this stone in net dimension blocks? A. He never reported to me that they were not getting the stone in net dimension in block in that language, but I am willing to say that he did refer to certain individual stones here and there once in a while coming in a rather large, oversize rubble ball, and wished that they might come a little smaller and save Mr. Graham a little more material extra work in dressing the stone down. There are a few stones in working out on, and quarrying, as I have already described, that in spite of ordinary care and usual precautions a quarry stone would come out rather clumsy and not as close to the exact net dimensions I mean the finished dimensions of the stone that would be desired, but that is the slightest part of all quarrying, especially in granite work. I wished the net dimensions the stone would be could be exactly what Mr. Graham I wished it would have happened that the stone would have been split down exactly without any an inch to come off, if possible. It was not possible to do that and not at all to be expected under the contract. These stones should be furnished from the quarry cut down for the cutting to any such fine close dimensions as that required, but that is not done in any quarry. Some stones that were [illegible] sent to Mr. Graham were too small, smaller than they ought to be. There were not many of those but in the process of quarrying, we take from the contractors as small stone as possible we never it came that way and on the other hand, occasionally, it was fair to Mr Graham and the contractor, we take some clumsy stones.

They are quarried in all sorts of weather conditions, and as I have already said, come in endless varieties of shapes and sizes for the different stone. They could not be very close in their shape to the net stone after it was finished. It was not to the interest of the Thompson-Starrett Company to send down more stone than necessary as they did not get any more or any less money for the stone, the price was 82½ cents per cubic foot — a pretty good price — and it was to their interest to furnish all the stone called for in the general contract so that they may get that much more money for it, and not to furnish a pound more than was necessary for the work because it was so much stock thrown away. Some of the stone that would come in

some cases, that were large enough, they were not cut for the particular stones they were numbered for in the quarry, but it was found that they could be split up and some of the other of the stones cut out of those blocks than those intended. These things were adjusted all the way along as the work went on, and taken all together it was a very fair statement of the subject of the differences that could be figured account of it by any possibility as against Mr. Graham, and allowing everything possible, and adding 100% to that, if you choose to be more liberal, it wouldn't amount to 1% of the whole contract even if it could be proved. It was a mere trifle. As I say it is such a trifling matter on the whole contract of the work, thousands of stones in it, that it was no more than Mr. Graham, or any other contractor, taking his contract, would have to allow for and expect in the progress of his work. This stone was quarried especially for this job by these people as Mr. Graham would have done for the other men, his correspondence had been in their place.

Q. All that Mr. Graham could reasonably expect, was it? A. What, sir?

Q. The stones as regards the net dimensions, was all that Mr. Graham could reasonably expect? A. Taking the whole contract all the way through, it certainly was in my judgment.

Q. Look again at this letter of July 25th, which was admitted in evidence this morning and refresh your memory by reading the first paragraph thereof. "I am returning Mr. Bailey's letters to you with a few remarks because I think from what you saw here the other day—

The Witness: That isn't a letter.

Q. —and what you have read on the subject, you are satisfied that Mr. Graham has not been getting the net dimension block that he might reasonably expect to get under your specifications of September 20th, 1906." Now refresh your memory by looking at that paragraph and state whether that changes your opinion. A. Changes what opinion. I would like to know?

Q. That Mr. Graham got all that he could reasonably expect, as you testified? A. I find nothing here to change that opinion.

Q. You find nothing whatever there. Mr. Pirie is a man, you have testified, who has given his lifetime to this work, I believe, is that correct? A. He has been a stonecutter, yes, a granite man for a long time to my knowledge, but I do not know whether it has been all his life or not.

Q. During this whole contract you never saw anything to induce you to believe that these stones were not coming in net

dimension block, is that true? A. I think I have already stated, taking the whole contract together, as one piece of work, that on the whole, on the average, if you please, or what you want, the stone was reasonably furnished to Mr. Graham in net dimension.

(413) Q. Did you complain to the Thompson-Starrett Company that it was not furnishing this granite in net dimension blocks? A. I believe I did. I intimated that in some former [illegible] because my attention was called to it. The tendency, in some cases, in the quarrying down there, was to turn out some stone a little larger than seemed to be fair, and Mr. Bailey, the Inspector down there, was on the lookout for that, and [illegible] attention to the work, and when he believed they were getting too unreasonable and were putting in larger stone, he called their attention to it. That referred to only a comparatively few stones in the whole job, and it was an occasional [illegible] surrounding the inspection of the stone at the Thompson-Starrett Company quarry.

Q. If the stone were furnished too large, Mr. Green, that means extra work for Mr. Graham, didn't it? A. Oh, yes, I have already explained that.

Q. And if they were furnished too large that meant extra freight for Mr. Graham, didn't it? A. Yes.

Q. Now, proceed and explain both of your answers if you wish. You said you could explain it. Do you wish to explain it, sir? A. I do not know that there is anything to explain.

Q. I do not think there was myself; but you said you could explain it? A. I have already explained it. I do not want to repeat my statement.

Q. You referred to 1% of the contract as being trifling. Don't you know that 1% of this contract would be in the neighborhood of $1,500? A. Why, yes, I should say it was. 1% of $150,000 would be $1,500.

Q. Look at this memorandum which I hand you? A. I am only giving an estimate in the matter and the 1% was just to illustrate what a trifling amount it would be on the whole contract, if it did happen.

Q. Before you look at that let me follow out this suggestion. Then, if it was a little larger, it would not take very much to make it 2%, would it? A. It would take 1% more upon that.

(414) Q. That is right. Then it wouldn't have to be very large before it would be 5% would it, is that true? A. That is true; that is good arithmetic.

Q. And 5% of that contract is nearly $7,500. Will you kindly look at that and tell me whether you recognize the hand-

writing? Just answer Yes or No and give these gentlemen an opportunity to object.

Objected to.

The COURT: He can ask the question.

The WITNESS: It resembles Mr. Pirie's handwriting.

Q. Did you receive a report containing substantially that information from Mr. Pirie?

The WITNESS: This is a pencil writing on a sheet of paper and I do not remember having has any letter, or any information from Mr. Pirie, whose handwriting appears here, on this subject.

Q. You do not remember it? A. No, sir.

Q. Haven't you, in your files, a letter of August 5th, 1907, containing that information? A. I do not know, sir.

Q. You do not know? A. No, sir.

Q. I call upon you to make an examination of your files and produce it tomorrow morning, if you have it? A. The matter of that paper is simply relative to a crack or flaw in the stone apparently and this was some memorandum in regard to how it might be—

Mr. HARLEY: Just one moment. You produce the letter, if you have it, and then we will offer it in evidence, sir, and that will tell all about it. (The plaintiff here produces letter of August 5th, 1907, asked for by the defendants.)

(115) Mr. HARLEY: Now, I offer this in evidence, if your Honor please, letter of August 5th from Mr. Pirie to Mr. Green.

The WITNESS: What shall I do with this (indicating)?

Q. You got that letter? A. Yes.

Mr. HARLEY: I will read it with your Honor's permission.

Letter of August 5th, 1907, from Mr. Pirie to Mr. Bernard R. Green, as follows:

"Stone D-9 received May 18. 3rd shipment would not make on account of seam or shape in face, which worked loose in cutting through, by fault of the workmen's here or oversight of the inspectors at the quarry. To save what work and stock we could, the stone was cut down to G-23, losing in cube 6′ 4″. Stock for G-23 was received on the 28th shipment, but will not make D 9. Of course, it will make W-4, No. 8 on sheet 8. A stone 3 6 7/16, 2′ 4″ x 1″, 10″ ½ cube 15. 6. Please

instruct the quarry contractor to check W-1 No. 8 off as here, and again quarry and ship to Mr. Graham stone D-9 3-4 x 2 10½ x 20 cube 18-0.

Loss in cube to the *Govt.* in this transaction is 2-6 cubic feet. Before the shuffle it was 6-4 loss.

I am returning your invoices of the 28 and 30 cars and with the exception of a few stones which had loose shells hanging on to the backs of them which Mr. Graham complains of I have to class the two loads as fair. The quality of ashlars is also much better and I am moving good ones down in place of those that I moved up last month. I received blue print of setting plan Sheet No. 8."

Q. Now, Mr. Green, do you know about what time the first carload was shipped to Mr. Graham?

The WITNESS: I do not.

Mr. HARLEY: Do you know about what time it was shipped, Mr. Green? A. No, sir. Q. Do I know when the first car was shipped from the quarry to Mr. Graham?

(1161) Q. Yes. A. I have already seen by the records that it was shipped in the latter part of January.

Q. The latter part of January? A. I think that is somewhere near it.

Q. You say you have the record of that? A. I do not know; it is probably amongst the records.

Q. Did you see that first shipment? A. I do not remember whether I did or not.

Q. What is the average weight on granite per cubic foot, Mr. Green? A. The average weight per cubic foot is somewhere about 165 lbs., the exact cubic foot.

Q. 165 lbs.? A. Something like that. It isn't exact as it depends on the kind of granites. There are very different variations, but in a general way, that is within a few pounds.

Q. Would you call stone that averaged up 295 lbs. as being in net dimension block per cubic foot? A. What do you mean by that?

Then I will add to that question "per cubic foot" (This has already been added to the question as it appears on the record, but was not asked in the question objected to.) I will reframe the question. Take a car containing 333 cubic feet of stone after it is cut. If that car averages up per cubic foot 294 lbs. would you say that that was net dimension block? A. Assuming that I know what you are after, I would say under the general circumstances of the contract, taken as a whole, that it could probably be considered net dimension.

Q. Now, let's see. If in a carload of granite, which ought to weigh when cut, 165 lbs. to the cubic foot, it averages up to

294 lbs. to the cubic foot, you would say that that was net di-
(417) mension block, would you? A. I would say in considera-
tion of the whole contract, that it was. I would not say it was for that particular car containing two or three stones, some as big as the desk here, and some a smaller number of feet. The car contains such stones as were used in this contract, various size stones, and oftentimes a carload wouldn't have any more than two stones in it, and other times, it might take in a dozen. If you are talking about one or two stones only, I would admit, I have practically already admitted that, that some of the stones coming down there were of such large dimension that I would not call them net dimension, ordinarily, as far as these particular few stones are concerned.

Q. Conceding that you are wrong in assuming those were large stones, and assuming that there weren't just a small number of stones on that car, but that there were 26 stones, would you say that an average of 294 lbs. to the cubic foot was furnishing those stones in net dimension block? A. I would say it was.

Q. You would say that? A. Yes, sir, that it might be. I cannot say positively; I cannot answer more specifically and exactly than that because I do not know any of the shapes and peculiarities of that particular lot of little stones, to which you referred, contained.

Q. Assuming that there were six stones in a certain car, would you say an average of 290 lbs. to the cubic foot was furnishing them in net dimension block?

(Question objected to; admitted subject to exception.)

A. I think I can make answer to the question in the case of six stones forming a car load, got up as high as 290 lbs. to the cubic foot on the average; it would be rather large and a little over what would be the fair dimension considered under the whole contract.

Q. Mr. Green, is it furnishing stone to a man in net dimension block to make him pay for the freight on 294 lbs. in order that he may get 165 lbs. out of it?

Objected to; sustained; exceptions noted.

(418) Q. You have stated that a cubic foot of granite would average 165 lbs. to the cubic foot? A. The exact cubic foot, yes, but nothing on the outside, no extra size.

Q. Now, I ask you whether it is furnishing granite in net dimension block to furnish 294 lbs. of stones for every 165 lbs. you have to use? A. I should think it is furnishing net dimension block. I want to say that you are on the wrong track in this matter, somewhat, in considering it on the basis

of 165 lbs. None of the rough granite cutting, no matter how close it is, as long as it is large enough in the rough to get out a net sized block when finished, the average weight per cubic foot would be 165 lbs., no such block would be so small to bring it down to 165 lbs. It would have to be in the neighborhood of 225 or 250 because the block must contain surplus material on the outside to make it weigh 250 lbs. to the cubic foot or higher. When you speak of net dimension, make them as net as you please, but consider it on a basis considerably higher than 165 lbs.

Q. We understand that thoroughly, Mr. Green, at least we think we do and we do not think we are on the wrong track, and we simply ask you whether 294 lbs. as to net dimensions is a fair representation for 165 lbs.? A. I do considering the contract as a whole.

Mr. HARLEY: Gentlemen, we ask you for the production of letter from Mr. Graham's then counsel, Mr. Scherf, to Mr. Green, dated March 19th, 1908.

Mr. HILL: Here it is.

Q. Did you receive that letter of March 19th, 1908? A. I received this letter.

Mr. HARLEY: I offer it, if your Honor please.

March 19, 1908.

Mr. Bernard R. Green,
Superintendent of Construction,
Library of Congress, Washington, D. C.

My dear Sir:

(419) Yours of the 18th addressed to Mr. Frank F. Graham has been handed to me for reply. I desire to state that we cannot concede any default on the contract for the granite for the South Pavilion for the National Museum in Washington, District of Columbia. All defaults happening in this matter, according to our contention, are on the part of the Government. We would only be too glad to do all that is fair and equitable between the government and Mr. Graham, and we are perfectly willing to have the government use our plant, provided the damage we have sustained can be amicably adjusted.

Hoping this matter can be adjusted without legal proceedings, I beg to remain,

Most respectfully,

HARRY E. SCHERF."

The COURT: March 14th, I have a note here "my client has stopped work, etc." I take it that fixes the fact that Mr. Graham did stop work.

Mr. HARLEY: Yes,—I think that is to be explained. There is no doubt about Mr. Graham stopping work temporarily—no trouble about that.

Q. Did you send this letter? A. Yes.

Mr. HARLEY: I offer this, if your Honor please. March 20th, 1908. Title Guaranty & Surety Company of Scranton, Pa., Colorado Building, Washington, D. C., Gentlemen: I enclose herewith, for your information, copy of letter of the 19th instant, from Harry E. Scherf, alleged attorney for Frank F. Graham, and my answer of this date. Yours respectfully, Bernard R. Green, Superintendent of Construction. That letter of the 19th, is that the one that has just been read? A. I suppose it is.

Q. In that was enclosed this letter of March 20th, 1908. Mr. Harry E. Scherf, etc. Sir:—Your letter of the 19th inst., on behalf of Frank F. Graham, is received, stating that he will be perfectly willing to have the Government use his plant in (420) the continuation by it of the work on his contract for the National Museum Building, which is what I understand you to refer to, provided the alleged damage he has sustained can be amicably adjusted.

You doubtless must understand that the Government will proceed immediately with the continuation of the work somewhere, and, if with the use of Mr. Graham's plant, it can not depend upon the preliminary adjustment of anything. If there are any so called adjustment to be made, they must be independent of the continuation of the work on the contract. Yours respectfully, Bernard R. Green, Superintendent of Construction." You wrote that letter, Mr. Green, did you not? A. Yes, sir.

Mr. HARLEY: I offer it it in evidence.

Q. Is this the statement that you delivered to Mr. Graham?

Mr. MCLANAHAN: That is all right except the credit for the freight.

The WITNESS: It looks like it, the marks on it show it. I must have delivered him some such statement as that. It looks very much like it, and I suppose it is all right.

Q. Suppose you examine it, and be sure that it is, Mr. Green? A. I cannot check up in my mind all those figures. It comes out at the end all right. It is headed "Approximate classified statement of items of cost to the United States on account of F. F. Graham contract."

Q. Isn't that the statement that you furnished on or about March 25th, 1909, to Mr. Graham? A. Evidently it is.

Mr. HARLEY: I offer it in evidence.

The WITNESS: I am willing to say that it is the statement.

Mr. HARLEY: I will read it.

"APPROXIMATE CLASSIFIED STATEMENT OF ITEMS OF COST TO THE UNITED STATES ON ACCOUNT OF F. F. GRAHAM.

(421)

Services,	123,963.26
Material for Sheds,	1,436.91
Miscellaneous Hoisting Material,	547.32
Rental Hoisting Apparatus,	2,050.29
Rental Air Compressor & Boiler,	607.00
Freight & Car Service,	15,858.98
Miscellaneous Tools,	4,054.82
Removing Stone from Graham's yard,	665.50
Teaming Stone about Building,	777.13
Fuel,	466.68
Stone Spoiled in Cutting,	156.68
Drayage to Building,	1,958.01
Miscellaneous Contingent Expenses,	181.07
	152,723.65
Deduct for extra cutting on pilasters and column capitals, cutting raglets, etc.,	3,042.90
	149,680.75
Cash payment made Graham,	59,400.00
	209,080.75
Amount of Contracts,	153,000.00
Excess,	56,080.75

It is estimated that of the miscellaneous tools purchased for the above named sum of $4,054.82, there are on hand tools to the value, using original cost figures of about $3,400 from

which there would be realized at forced sale approximately $1,100.

Q. Look at the letter of March 11, 1908, already in evi-
dence, you remember that letter, don't you, to the Title Guar-
(422) anty & Surety Company? A. Yes, sir.

Q. Did you before March 11, 1908, address any communi-
cation whatever to the Title Guaranty & Surety Company in
reference to this contract? A. I can not say. I don't remem-
ber.

Q. Can you tell from your records? A. Yes, sir; no doubt.

Q. You are called upon to produce any communications you may have? A. Well—

Q. Where are these records? A. They are in my office; I don't know if they are all here. The attorney can explain that. I don't know just what is here.

Q. Have you any knowledge of any communication addressed to that addressee in relation to that subject matter before that time? A. I don't remember about it.

The Court: Have you, Mr. Harley, as counsel for that company, any?

Mr. Harley: No, sir; none whatever, sir. This is the first communication that the Title Guaranty & Surety Company got with reference to the matter.

Q. Now, take this pay roll, cash $6,294.92, to which you have testified, and tell me what part of that was paid on account of the executed $149,000 contract, and what part was paid upon the unexecuted $4,000 contract?

Mr. Hill: That is the number of that voucher?

The Witness: No. 1,448.

Q. (The Court) That is one of the pay-rolls? A. Yes, sir.

(Question re-read)

A. I cannot tell by this roll.

Q. In other words, you lumped it together? A. Yes, sir; it was all one piece of work.

Q. It is all one piece of work and you lumped it all to-
(423) gether? A. Lumped it together, as far as that pay roll goes.

Q. Didn't you lump it together as far as the statement which you have presented to the jury is concerned? A. Yes, as far as that pay roll is concerned. I don't know whether there is any distinction made in the pieces of work that went in the one amount or in the other anywhere.

Q. But in the claim which you have made to the jury for some $56,000, have you made any segregation of the two contracts or have you lumped them altogether? A. No, we have lumped them altogether.

Q. Mr. Green, how many cars of cut stone did Mr. Graham ship to you please, sir? A. I don't know.

Q. Haven't you any data in your possession to show? A. My office has, and my accounts have. I don't carry these things in my head.

Q. I don't ask you to carry it in your head, but have you in your possession any data that will show the number of cars? A. Yes, sir.

Q. How many cars were there? A. I don't know. I have the data in my office; it is on my records, of course.

Q. Well, do you know how many cubic feet of stone Mr. Graham shipped to you? A. I don't remember.

Q. Do you know how many cubic feet of stone you cut yourself on the Graham job? A. No, sir; I haven't it in my mind.

Q. Have you any data to show that? A. I think the records of my office will show those things.

Q. Have they been produced here, sir? A. I don't think they have.

(424) Q. You have nothing here to show, then, how many cubic feet of stone you cut on the Graham job?

(Objected to.)

But the said question was objected to by the plaintiff's counsel, and the court sustained the plaintiff's said objection and refused to permit the witness to answer the same. (The reasons for the court's action appear in the 18th (eighteenth) bill of exceptions.)

To which action of the court in sustaining the objection to the said question offered and propounded and in refusing to permit the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their seventeenth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Eighteenth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their eighteenth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

The witness, BERNARD R. GREEN, still under cross examination.

Q. You have nothing here to show, then, how many cubic feet of stone you cut on the Graham job?

Mr. MCLANAHAN: We have the records here, but this is not the proper witness to prove this matter by. We do not propose to prove that data through a witness who did not make the records.

The COURT: You can not expect a man in charge of a big job like this to carry all those figures in his mind.

To which action of the court in using to counsel for the defendants in the presence of the jury the said language "you can not expect a man in charge of a big job like this to carry all those figures in his mind," the defendants and each of them then and there excepted and prayed the court to sign and seal this, their eighteenth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Ninteenth Bill of Exceptions.

(425) After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their nineteenth bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

The witness, BERNARD R. GREEN, still under cross examination:

Q. We wish to show you this voucher and ask you if that will refresh your memory so that you can tell the number of cubic feet of granite cut by Mr. Graham? A. I don't see that it shows the number of cubic feet cut by Mr. Graham.

Q. I ask you whether looking at that voucher you can tell the number of cubic feet which Mr. Graham cut at the time that voucher was executed? A. You can not tell that by that voucher, how much stone he had cut at that time.

Q. You could not tell that? A. No.

Q. That included all the cars that had been delivered up to that day, didn't it? A. I don't know whether it did or not.

Q. Haven't you certified that it was correct? A. I have.

Q. And yet you don't know whether it included all the (426) granite that was cut up to that time? A. I don't know, and I don't believe it does.

Q. Haven't you testified that that was substantially a payment in full to Mr. Graham up to date? A. No, sir; I have not testified to that.

Q. And you don't now testify that? A. No.

Q. You do not claim that on the day of this voucher, January 4, 1908, this was a payment in full of all he was entitled to? A. In my judgment it was all he was entitled to at the time, and therefore I paid the voucher at that time.

Q. But you don't know that? A. I don't know and I don't believe it was paid up.

Q. In fact it never was paid in full? A. I don't suppose it was up to date.

Q. The 90 per cent. never was paid? A. The 90 per cent. was paid every time we made any payments.

(427) Mr. McLANAHAN: This seems to be entirely irrelevant. The contract does not say how often payments should be made, whether it shall be every day or every week, but that it shall be paid as the work progresses, in the judgment of the superintendent.

Mr. HARLEY: Show me where it says that "In the judgment of the superintendent."

The COURT: What is the relevancy of this testimony?

Mr. GAITHER: We want to show that this witness has not given us credit for what was delivered up to this time. It says so much money due on the contract, and we are asking him if he knows whether that is correct or not, how much we had delivered up to that time.

The COURT: Who is the voucher made out by?

Mr. GAITHER: By the Government.

The COURT: And presumably it is for the amount that has been received at the building.

Mr. GAITHER: Yes, sir; and we are asking him if that is so or not. We certainly have a right to question him on that fact and show that he does not know the statement contained in the voucher which he certified to. We will show that he does not know that that is the amount due at that time.

The COURT: I do not think it is pertinent.

Mr. GAITHER: It is pertinent to show what this witness knows about it. If we delivered stone and it is accepted by their superintendent then we are certainly entitled to payment for it.

(After argument.)

(428) The COURT: I never understood that in paying from time to time you had to pay for what had been delivered at the time the voucher was made out. I sustain the objection.

(Exceptions noted.)

Q. We show you voucher No. 1,292 and ask you to look at it. Do you remember that voucher? A. Yes, sir.

Q. That is the last payment which you made to Mr. Graham, is it not? A. Up to that time, perhaps, I don't know.

Q. Look at it and see if you can tell us whether or not you made payment to Mr. Graham after that time? A. I don't see anything in this voucher to show whether I paid anything to Mr. Graham after this time or not.

Q. Don't you know whether you paid him anything after that time or not? A. I can guess at it and tell you that way; I think about it or I can believe; but I don't know.

Q. You don't know? A. I cannot base a positive answer on that piece of paper.

Q. You don't know whether you paid him anything or not?

(429) A. I do know we paid him money and a good deal, up to that point.

Q. But you don't know if you paid him anything else? A. No, I don't know whether we did or not.

Q. Do you mean to say that is 90 per cent. payment of what was delivered by Mr. Graham up to that point? A. No, it was 90 per cent. of that voucher.

Q. The net amount of that is $2,924, and that was what? A. It was to be paid him as the work progresses, according to the judgment of the superintendent of construction—

Q. Well, the amounts you paid were mere estimates, then, were they? The amounts you paid were on more estimated cubic feet? A. Not estimated, but calculated cubic feet, an estimate of how much to pay on this.

Q. Tell us how many cubic feet you calculated on it pay him that money? A. I don't know how many cubic feet.

Q. Do you know how much you paid him a cubic foot? A. I don't know.

(430) The COURT: The contract provided "that payments will be made from time to time as the progress of the work may warrant. A percentage of 10 per centum will be reserved from each payment until the whole of the cut granite called for by the annexed contract shall have been satisfactorily delivered and accepted." That is to say they were to pay you from time to time as the work progressed 90 per cent.?

The WITNESS: In the superintendent's judgment.

Mr. HILL: It does not say he had to pay 90 per cent.

The COURT: It says 10 per cent. shall be reserved.

Mr. HILL: But that does not mean that 90 per cent. must be paid.

The COURT: What is the purpose of this, Mr. Harley, do you refuse to state to the court for what purpose you are asking this question?

Mr. HARLEY: Certainly not. Read me the question, Mr. Stenographer.

(Question referred to was then read by the stenographer.)

The COURT: He has already said that to pay $2.50 a cubic foot would be a fair estimate.

Q. (Mr. HARLEY) You do not claim that this accurate in any way?

The COURT: It could not be accurate. This is a contract for a lump sum.

Mr. HARLEY: That would be the easiest thing in the world to do.

The COURT: But how can you say that he was entitled to so much money per cubic foot under such a contract?

Mr. HARLEY: They always furnish a unit price for all that work. The unit price is the amount of the whole contract divided by the number of cubic feet, and we have shown already that the most difficult work we had already done.

The WITNESS: No, I think it was quite the other way.

The COURT: I understood him to say that the work that had been finished was the least difficult.

Mr. HARLEY: Didn't your Honor hear him say that the work under the nodillion was the most costly and difficult work?

The COURT: I cannot understand why you should say so when the only witness who has been examined so far, this witness, stated to the contrary?

Mr. HARLEY: We have divided it up and averaged it and we want to show now that this voucher does not come up to the average.

The COURT: I do not see that you have any right to make an average. The contract provides that payments shall be made from time to time as the progress of the work warrants it. Now who is to judge that?

Mr. HARLEY: Why, the jury is to judge it.

The COURT: I do not think so.

Mr. HARLEY: May I ask the question. Will you read the question, Mr. Stenographer?

The COURT: Yes, answer the question.

(431) A. As I said before, we assumed for convenience in making up the accounts a rate of $2.50 per cubic foot. That was not a fair rate for all the work. In some parts of the work it was too low and in other parts it was too high, but we used it for convenience, and in the early part of the work Mr. Graham got more than he was entitled to.

Q. (Mr. HARLEY) You have already stated in your testimony that on the next car it was averaged up at that time? A. No, sir; I don't think it was. I think Mr. Graham got too much on the early part of the work.

Q. Well, do you know that it was not averaged up to the (432) average standard of the work? A. I don't know. That $2.50 was only a matter of convenience to enable us to pay Mr. Graham. I paid him up in many cases as close as I could, and in some cases I paid him too much.

Q. Do you know whether the most difficult work was done? A. These little medillions in the cornice I said had been done before he threw up the contract and the most of them could have been put in a dump part, and it did not amount to a snap of the finger on the whole job. That would amount to more than $2.50, but when you figure it up per cubic foot it would not amount to a small amount on the whole job. You can figure out the work there, all the carving that was necessary, but it was a small amount considered with the whole job. They could have been picked out, those pieces, from the chips that came down, as far as that went. They were trifling things, but for those little things he would have been entitled to more, but the whole thing added up is a mere trifle on the whole job.

Q. Had we done all the carving work we had to do? A. I don't think he had. There was not much.

Q. Now, your 60,000 cubic feet was a mere estimate?

(433) The Court: It must have been a mere estimate.

Mr. Harley: The 60,000 cubic feet in the contract was a mere estimate.

The Court: Is 60,000 cubic feet stated in the contract?

Mr. Harley: No, but he said that he estimated it at 60,000 cubic feet.

The Court: But suppose when he came to estimate it they found that they had paid him all but $10—all he was entitled to was the amount of his contract, $149,000?

Mr. Harley: And he was entitled to 90 per cent. of it as the work progressed.

The Court: How could you get that amount except by an estimate?

Mr. Gaither: Well, your Honor, that is what we are asking him, whether that 60,000 feet was not an estimate.

A. You can call it an estimate, if you want to.

Q. It was a mere estimate, a very liberal one, was it not? A. In what way?

Q. Wasn't the actual number of cubic feet shown in those drawings very much less than 60,000? A. No, I don't think it was.

Q. Do you know how many cubic feet were shown in the original drawings referred to and made a part of our contract? A. We only estimated in the beginning—

Q. You never figured it out? A. We figured it out to get the estimate. It was estimated by figuring.

Q. Do you know how many there were? A. How many what?

Q. How many actual cubic feet there were in those original plans? A. I don't know precisely.

(4331)

Q. Do you know how many cubic feet were in the extras? A. In the extras?

Q. Yes. A. What extras?

Q. The extras referred to in the unexecuted contract. A. That was figured up and given in a letter which you have put in evidence.

Q. Do you know where that letter is? A. It was put in evidence here the day before yesterday. The estimate in it, however, is Mr. Graham's estimate, not ours.

Q. Is it correct? A. No, I don't think it was; at any rate, we had to refigure it and the result was that we compromised it.

Q. Look at that (indicating paper) and state how many cubic feet were in the extras? A. I can not tell that. I can tell you what is in this letter, but I cannot tell you that it is correct. We did not make the estimate.

Q. What is in the letter? A. Well, there are four or five pages of figures.

The COURT: Do you want to go through all of that?

Mr. HARLEY: We want him to tell us how many cubic feet there were in the extra job referred to in the contract which he says was unexecuted.

The WITNESS: It is not shown here.

Mr. HILL: I would like to know what that paper is.

The COURT: It is a claim made by the contractor for extra work.

Mr. GAITHER: No, this covers the extra things due to the changes in the plans, and what we want to find out is how many cubic feet there were in that.

The COURT: That is the claim made by Graham of what he said was the amount of extra work.

Mr. GAITHER: On account of the changes.

(435) The COURT: Yes, sir. But I cannot see the materiality of this.

Mr. HILL: What is in that letter, Mr. Harley.

Mr. HARLEY: It is the letter that the witness called for.

The COURT: Can't you tell what it is?

Mr. HARLEY: It is a paper that the District Attorney handed to me after the request of the witness, and it seems to be a letter already in evidence sent from Mr. Graham to Mr. Green.

Mr. HILL: The only reason I asked was because when we asked as to that letter before they denied that it was from Mr. Graham. Now it is admitted that it was from Graham to Green.

Mr. HARLEY: We have not admitted anything.

The COURT: They say that it is a letter from Graham to Green. A. This (indicating) is Mr. Graham's figuring in pen and ink over several sheets of paper giving dimensions of stone and multiplying by prices, etc. I can figure it out in a few minutes; but this is his own figuring and I don't know whether it is correct or not.

The COURT: The contract says that the payments shall be made from time to time as the progress of the work may warrant. Surely the man who is to make the payment is the man to judge how much is warranted.

To which action of the court in using to counsel for the defendants in the presence of the jury, the said language "The contract says that the payments shall be made from time to time as the progress of the work may warrant. Surely the man who is to make the payment is the man to judge how much is warranted," the defendants and each of them then and there excepted, and prayed the court to sign and seal this, their nineteenth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Twentieth Bill of Exceptions.

(136) After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their twentieth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

The witness, BERNARD R. GREEN, still under cross examination:

The WITNESS: I will have to make some calculations.

Mr. HARLEY: I do not see why it takes you so long.

The COURT: Well, suppose you make it, then.

Mr. HARLEY: I will, with a great deal of pleasure. If I have it after recess, will that be all right?

The COURT: Yes, sir.

Q. Now, my understanding is that you do not remember approximately the number of cubic feet covered by the original contract? A. I said there were about 60,000.

Q. That is in the original contract? A. Yes. There might be two or three thousand more or less; I don't know precisely.

Q. Now, Mr. Green, take this voucher again. That voucher shows that you paid how much to Mr. Graham? A. This voucher shows that we paid—do you mean the payment on this particular voucher or everything up to date?

Q. Doesn't that show everything up to date? A. Yes, sir; everything up to date.

Q. How much does that show? A. It shows that we paid $63,300 up to this time to Mr. Graham.

Q. And you wern't estimating the payments at $2.25 a cubic foot? A. I think that was used—no, $2.50.

Q. Well, you deducted 10 per cent. which would leave
(137) $2.25, is that correct? A. I suppose that would be correct; although we did not do it that way; we paid at the net rate.

Q. Well, it would be $2.25? A. Yes.

Q. And this indicates a payment of $63,300? A. Yes, sir.

Q. Now, 66,000 at $2.50 a foot would give us—

The WITNESS: Why are you using 66,000? What is 66,000?

Mr. HARLEY: I beg your pardon; I will show you the voucher again.

The WITNESS: Well, this shows gross 66,000 in feet.

Q. That shows a payment for 26,400 cubic feet, is that correct? A. I should think it would come out that way, if you divided this 66,000 by $2.50.

Q. And that did not include any pay for extra cutting of sizes, did it, sir? A. I don't think it included any payment for any extra work.

Q. Don't you know that it did not include any payment for any extra cutting of sizes? A. I don't know; but I don't suppose it does.

Q. Did it include any payment for extra freight for large sizes? A. No, sir.

Q. Did it include any payment for freight from the quarry to the station in Bethel, Vermont? A. It included the work involved, both the freighting and cutting and everything else all lumped into one payment.

Q. Did it include any extras whatever?

The COURT: He says it is an estimate of so much per cubic foot. There are no extras that appear in it at all. It is an estimate at so much per cubic foot.

Mr. HARLEY: Gentlemen, I would like to have the letter of Mr. Graham of February 10, 1908.

Q. Look at the letter which I now hand you and state whether or not you received that from Mr. Graham? A. I (438) received that letter.

Mr. HARLEY: I offer it in evidence.

"Sir:

Relative to your letter of the 7th instant referring to a slowness in cutting of stone for the National Museum contract and quoting the time of completion for this contract as October 1, 1907;—I beg to say from the beginning of the work, October 23-'06, until Feb. 12-'07, but one car of rough granite arrived from the quarry.

No more stone arrived after this until May 18, when a second car load came to hand; up to July 1-'07, we had received

but 13 cars of rough stones; during July to Aug. 1—13 more came; and up to October 1-'07, the time dated, to complete said contract, I had received but 47 cars from the quarry.

This shows it to have been impossible to complete the work in the specified time, with such a very small percentage of stock received.

The majority of the stone, that has come in, has been received during the winter months—a time, when it is impossible for the men or tools to do as much work, as under favorable circumstances, and when the cost of handling is far more than in good weather.

In order to carry on this work, I put in about $5,000 worth of extra machinery and then was compelled to take about $25,000 worth of outside work to meet expenses, all because of the delay of not receiving proper stock from the quarry.

This work has had to be cut and shipped, but it is now nearly finished and I intend to devote my entire yard to Museum work, until I see the job about completed.

Those things have proved nothing but a loss to me, and under the circumstances, payments on the Museum cutting must be made as previously, in order for me to carry the work to completion.

Very respectfully yours,

F. F. GRAHAM."

Q. I show you letter of December 28, 1907, and ask you to state whether you wrote it? A. This is my letter, sir.

(439) Mr. HARLEY: I offer it, if your Honor please.

"Dear Sir:

I have to acknowledge the receipt of your letter of the 18th instant and the bill of $1,420.90 therewith, accompanied by tabular details explanatory of the charges you therein make for extra freight and roughing out on the stock you are receiving for your cutting contract for the National Museum building.

You have occasionally referred to this subject orally, but I have more than once told you that it was a matter that I could neither settle or control other than to do all that seemed to me reasonable in requiring the Thompson-Starrett Co. to send you good *patters* of stock. This I have always done, and although not so successful as desired in the beginning, I have heard no complaints for a good while past.

As to such a bill being chargeable to the United States government, it is out of the question, as you will see by care-

fully reading your contract. This matter is covered by paragraphs 6 and 7 in that instrument.

Very truly yours,

BERNARD R. GREEN,
Superintendent of Construction."

Mr. HARLEY: This paper dated February 20, 1908, which the court requested counsel to figure out, shows on its face 1,828 cubic feet, 9 inches, and I will show it to the jury. It is already in evidence.

(Paper referred to was then shown to the jury.)

Q. You stated that Mr. Graham had a former contract with you for the delivery of granite, I believe, on the same building? A. Yes, sir; that is true.

Q. Did he deliver it in time? A. I don't think he did.

Q. A big contract, was it? A. No, not so very big.

(440) Q. A $125,000 contract? A. It was about that. Whether it is large or not is a matter of opinion.

Q. A $125,000 contract, in your opinion, is not a large one? A. Under some conditions it would be.

Q. Well, he furnished the granite under that contract? A. Yes, sir.

Q. Now, you have stated and stated in your letter of October 19, 1906, that the price charged by Mr. Graham of $149,000 was fair and reasonable. That is correct, is it not? In your letter of October 19, 1906, you say: "The proposal of Frank E. Graham of Baltimore is reasonable." Is that correct? A. I suppose it is—that is the letter to the Smithsonian Institute. Yes, sir,—I suppose it is.

Q. Then, you say on page 147 of the record that $2.50 was a fair and reasonable charge, do you not? I beg your pardon, let us see where it is, then. It is on page 148. You state: "We averaged the price at about $2.50 as a price that the whole thing was worth." You testified to that didn't you? A. I suppose I did. It was not a question of worth, but simply a matter of dividing the whole amount of the contract by the estimated cubic feet and that came to about $2.48, and we called it $2.50 for a convenient multiplier and for no other purpose.

Q. You certify on the statement and in the various vouchers that the prices charged are just and reasonable, don't you? A. Yes, sir.

Q. Now, according to the bill you presented here what did it cost you per cubic foot to complete this job? A. Well,

that would have to be arrived at if you want an average price. If you take the total amount of money it cost us—

Mr. HARLEY: $149,680.75.

The WITNESS: And then you figure the number of cubic feet.

(441) Q. How many, about? A. I don't know.

Q. About 30,000? A. Oh, no. I don't know whether it is about anything. I can't even guess at it.

Q. As a matter of fact, don't you know that it cost, according to your figures nearly $5 a cubic foot for you to do that work? A. I don't know any such thing.

Q. Then you deny that it cost you $5 or nearly $5? A. I don't deny it: no, sir.

Q. How much approximately did it cost? A. I don't know.

Q. Did it cost you $1 a cubic foot? A. I don't know. I don't know whether it cost four or five.

Q. Did it cost you $4.50 a cubic foot? A. I don't know whether it did not cost $5. Perhaps it did. You can figure it up as well as I can. I never made the computation to find out. It is simply a matter of dividing one number by the other. I don't know either of the numbers.

Q. Look at the paper which I handed to you before dated February 20, 1908, and for which you called some time ago. That refers to the extra cubic feet, does it not and state how many extra cubic feet are shown there.

Mr. GAITHER: It is at the bottom of that sheet there (indicating).

The WITNESS: I don't know whether it is all there or not.

The COURT: Is it freight on the extra stone?

Mr. HARLEY: Not freight, merely, but freight and expenses of cutting and so on.

Mr. GAITHER: Doesn't this state it? A. Yes, the total amount of this is 1,828 9/12 cubic feet. That may be the whole thing and it may not be. I have not gone over the papers to see, but this shows 1,828 cubic feet and 9 inches.

Q. How much was that for $1,000, for the whole job of (442) extras.

The WITNESS: I do not understand the question.

Q. How much per cubic foot was that?

The COURT: Do you mean how much did that amount to in money?

Mr. GAITHER: There were 1,828 cubic feet worth $4,000; now we ask him to tell us how much that was per cubic foot.

The WITNESS: If you divide the $4,000 by 1,828 9/12 feet that will give the rate per cubic foot.

Mr. GAITHER: And that is what you wanted to allow on February 20?

The WITNESS: No, that is not correct; I said if you divide the $4,000 by 1,828 that will give the result. I can not do it in my head. I am getting too old to do it now. I used to be able to.

RE-DIRECT EXAMINATION.

Q. (Mr. HILL:) Here is a letter dated December 28, 1907, from you to Mr. Graham, which has been offered by the defense. Please read it to the jury? A. This is a letter written by me on December 28, 1907, to Mr. Graham.

Mr. HILL: I will read it and in that way save time.

(Letter referred to read to jury, said letter having been heretofore set forth herein.)

Q. Here is a letter dated December 18, 1907, addressed to you and signed F. F. Graham, enclosing a bill for extra freight $874.40, roughing out $546.50, total $1,420.90, and enclosing a latter sheet and tabulated statement. Please examine these papers and say if the letter previously read by me and offered by the defendants was written in answer to this letter? Was that letter received by you? A. Yes, sir.

Mr. HILL: I will read that letter (Reading):

"Enclosed please find a bill for extra freight and roughing out on job on the 65 enclosed cars of rough stock.

I am willing to pay the freight on anything not exceeding 40 cts. a cu. ft. but am not willing to go higher than that.

If you will look into the bill you will find that I have charged up these extras, viz: I averaged a number of cars on (443) which the freight stood 40 cts. cu. ft. and find that the average wt. would be 206 lbs., to 1 cu. ft.

On the bill to make it as plain as possible, I give:

1. The date car was shipped from quarry,
2. " cars and numbers,
3. " number of lbs. wt. on car,
4. " number of cu. ft. on car,
4. " lbs. in 1 cu. ft. on car,
5. " average lbs. in 1 cu. ft. at 40¢,
6. " surplus lbs. in 1 cu. ft. on car.

Multiply the surplus in 1 cu. ft. by the number of cu. ft. and you get the overweight due me, which if multiplied by 40¢ will give me the extra freight on car. Then allowing myself 25¢ a cu. ft. for roughing out this excess weight, I multiply 25¢ a cu. ft. by number of cu. ft. and this gives me pay for roughing out.

This will give me for extra freight,	$874.40
Roughing out.	546.50
	$1,420.90

I also give a list on cars on which freight ran under 40cts. and 40cts. even.

Respt. yours,

F. F. GRAHAM."

Q. Here is the enclosure in that letter, is it not? A. Yes, sir.

Mr. Hill: We offer all these papers in evidence.

(It is hereby agreed that the original enclosures mentioned above may be used before any court in the argument or at the hearing of this case.)

Q. Was this claim of Mr. Graham's ever paid by you? A. No, sir.

Q. On what did he base that claim, if you know? A. He did not base it on anything but his own idea or imagination, that he was entitled to some extra allowance over and above his contract, because of an alleged oversize of certain stones. He did not give us credit for stones that were undersized.

Q. This was a claim by him for oversized stones? A. That is what he states there.

(444) Q. Did Mr. Graham ever make any other claim against you for oversized stones furnished you in the first part of the contract? A. No, he never did.

Q. Did he ever make any other claims against you in reference to the other stones? A. No, sir.

Q. Did he ever make any claims of any rough stones? A. No, sir.

Mr. HILL: Counsel for the defendant offered this morning in evidence a letter from Mr. Graham to Mr. Green of February 10, 1908. May I have that letter.

(The letter referred to was then handed to counsel.)

Q. This (indicating) was a letter which you received from Mr. Graham? A. Yes, sir.

Q. Is this the letter which you wrote Mr. Graham to which he refers in the letter just read? A. Yes, sir.

Mr. HILL: I will read this letter (reading):

"I am just writing the Thompson-Starrett Co. of the extreme slowness of their quarrying and shipping of the stock for the Museum building which you are cutting under your contract, but am unable to emphasize the complaint by the progress you are making with the cutting. The work will be run into next summer at the rate it is going on, which can not be tolerated at all. Your contract, dated October 23, 1906, was to have been completed October 1, 1907, but you have completed only about one-third of it.

As to your part in the matter, I know you were somewhat delayed at first for want of stock from the Thompson-Starrett Co., and that, on the other hand, you were very slow at the beginning in furnishing the setting plans which they needed to work by. Even now the setting plans for the portico soffits are still wanting. Of course, I know the later cause of delay is this, but the plans should have been made early last year. (445) I am anticipating that both you and the quarry company will find yourselves in trouble in the matter of the cost of delay to the construction of the building. You will do well to very considerably hasten all your cutting from this time on, and in the meantime I shall have to curtail the progress payments, which have been liberal up to the present time in the faith that you would go on rapidly with the work, but you have not and are not making good.

Yours respectfully,

BERNARD R. GREEN.
Superintendent of Construction."

Q. Here is a letter addressed to you and signed F. F. Graham, dated February 8, 1908. Did you receive that letter? A. I did.

Mr. HILL: I will read it (reading):

"Relative to your letter of the 7th instant, referring to the shipping of stone to the Museum Bldg., I will be over to the office next week and talk matters over with you.

Respct. F F. GRAHAM."

Q. Did you write this letter to Mr. Graham (indicating) A. Yes, I did.

Mr. HILL: I mean the typewritten portion, not the written portion?

A. Yes, sir. The ink portion of the letter is my letter written to Mr. Graham on February 10, 1908.

Mr. HILL: This is a letter from Graham to Green on February 10, 1908. (reading): "It will be necessary for you to answer my letter of the 7th in writing, because, although we may have an interview, the main thing is to put the facts on record, on account of your own interest as well as those of the Government.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction."

Q. After writing to Mr. Graham the letter of February 7, and after receiving his claim, did you receive this letter from (446) him (indicating) A. I did receive that letter.

Mr. HILL: This is a letter from Graham to Green of February 12, 1908. (reading): "I will be over on Friday and would like you to give me a check on shipments made Besides this car of today, I will get out two more before Friday, and would like to draw on the whole as check is badly needed.

Yours truly,

F. F. GRAHAM."

Q. Mr. Green, after this correspondence, did Mr. Graham go on with his work under the contract? A. He went on a

while; this is February 12, 1908; he went on a while after that.

Q. He came over and got a check from you, did he not, after that correspondence? A. Yes, sir.

Q. On June 10, in his cross-examination of you at page 391 and 392 of the record, you were asked questions bearing on the question as to whether the detail drawings were necessary to Mr. Graham before he could make the setting plans. At page 393 you were asked also the following questions:

"There is no way that Mr. Graham could go ahead intelligently with that setting plan No. 1, before the receipt of these detail drawings, was there? A. I think he could.

Q. You think he could safely and intelligently go ahead— A. Yes, with some of the plans.

Q. With No. 1, if you please. I want to ask you whether Mr. Graham could prepare with intelligence and safety this setting plan No. 1 before he received those detail drawings referred to in that letter?" Your answer was, "I think not; No, sir." Now, I ask you what you meant by that letter, did you mean that in order for Mr. Graham to prepare setting plan No. 1, he had to have any full-sized detail drawing? A. It was not necessary for him to have any details.

Q. Was it necessary for him to have any detail to prepare (447) setting plans Nos. 1, 2 and 3? A. Not at all.

Q. On page 424 of the record, your cross examination, and on page 425, questions were asked you in reference to your absence from Washington; could or could not the work under the Graham contract be continued during your absence from Washington by your office force in Washington?

(Objected to; objection overruled.)

To the propounding of which question the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to answer said question.

(Exception noted.)

A. It could be continued and it was continued perfectly well.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their

twentieth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Twenty-first Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their twenty-first bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

The witness, BERNARD R. GREEN, still under re-direct examination.

Q. Here is setting plan No. 5. In your cross-examination upon plan reference was made to a panel. Please look at this plan; look at the contract drawings and show if possible where that panel appears on the contract drawing and explain what importance this panel has in the setting plan? A. The only (448) importance is has in the setting plan or in the work is the depth of the panel in the three stones that contain it, and these three courses as shown by the setting plans are put in the cutting, sunk in the three stones for the panel as was shown on the plan. They were not to be furnished by this contract at all but simply to receive a rough sinkage in the face of the stone. Nothing has been put in there yet. We make a panel of bronze or granite, but we don't know yet what we will make it of. We may make it of bronze of stone It was simply a little sinkage.

Q. Will you explain where that was? A. It was a little sinkage in the frieze at the head of the door. There was long one in the middle and two nearly square ones at each and shown in this section up here. It is this little piece here (indicating). This piece ought to shown also here. No, these are the three stones here that would have that sinkage come into them for some indefinite and uncertain sort of ornament that we might put in there later on. This piece here (indicating) is about eleven feet long and about twenty inches high, or one foot nine inches, and these little stones (indicating) are about fifteen inches wide and about one foot nine inches high. This is the line (indicating); half is shown here and the other half is hidden behind the column. That is all there was there.

Q. Letter of Graham to Green, October 4, 1907, heretofore offered in evidence, reads: "In starting to lay off setting plans for Drum wall of Dome, I notice a discrepancy between

"Quarter plan through Triglyphs" on F. S. D. No. 176 and the other drawings. The cavity or hollow space in drum wall is figured 3′ 10″, making outer diameter of drum 80′ 0″, in all other contract drawings this space is figured 1′ 10″ and the outer diam. 84′ 0″. In this drawing (No. 176) architects call attention to a change of ¾″ in height of triglyphs but make no mentioned of this more important change. I therefore hope it is an error; otherwise, I must ask you for an order (449) for the extra work it will entail. Please let me know what to do in this matter as I am anxious to finish setting plans as promised.

Yours very truly,

FRANK F. GRAHAM."

In letter of Green to Graham of January 31, 1907, you say: "The drawings in two sheets are forwarded to you by this mail in the same roll are full size details Nos. 176, 178 and 181 of profiles of the cornices, dome, base stones, etc." In that the full size detail No. 176 referred to in your letter of January 31, 1907, as being sent to Mr. Graham (handing drawing to witness)? A. Yes, sir.

Q. Is that the full size detail being sent to Mr. Graham? A. Yes, sir.

Q. Is that the full sized detail No. 176 referred to in Mr. Graham's letter of October 4, 1907, you saying "in starting to lay off setting plans for Drum wall of Dome, I notice a discrepancy between "Quarter plan through Triglyphs" on F. S. D. No. 176 and the other drawings?" A. This the drawing; yes, sir.

Q. But at any time during the ten months or thereabouts between January 31, when you sent Mr. Graham that full size detail, and October 4, 1907, did he ever write to you any letter to show that he found anything to be complained of in reference to the full size detail? A. I don't remember that he did; I don't remember anything of that kind.

Q. I now hand you letter of November 2, 1906, from Green to Graham. Did you write that letter? A. Yes.

Mr. HILL: This is the letter of Green to Graham of November 2, 1906, (reading): "Your letter of the 26th ultimo, submitting setting plan for the granite courses of the smoke and elevator shafts of the courts of the National Museum building, was received on the 19th.

The setting plan has been checked up by the architects and is returned to you herewith with one or two corrections in black (450) pencil The full size profiles of the cornice and ar-

chitrave have been received in red pencil. Please correct and return the drawings for my approval.

Your drawing indicates that you have overlooked the fact that the chimney for the east court extends 1′ 5″ wider in to the court than that for the west court, as indicated on drawing No. 163, and mentioned in my letter of September 29, 1906, transmitting it.

The raglets in the coping should be cut out as indicated." Does that refer to the Graham contract?

The WITNESS: Yes, sir.

Mr. HILL: (reading): "As to full size profiles for the south pavilion work, under your new contract, the Architects have them ready at their office but prefer to hold them for a day or two in connection with a study that they are now making.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction.
Per J. Q. S."

Q. Mr. Green, this was November 2, 1906; could or could not Graham have gotten any of the full size details from the office had he required them to make up the setting plans? A. He certainly could; they were all ready.

Q. Here is full sized detail No. 176, sent by you to Mr. Graham on January 31, 1907. Look at that detail and say whether or not Mr. Graham could tell from it the changed diameter of the dome and what the diameter of the dome would be indicated to be from this drawing. Look at this letter of October 4, which Mr. Graham wrote to you? A. This drawing shows, and he could obtain from it that the diameter of the dome was to be 84 feet instead of 80 feet, which seems to have been figuring on before, 84 feet.

Q. Then, from that drawing, No. 176, Mr. Graham could have told on the date of receiving your letter of January 31, 1907, that the diameter of the dome was 84 feet, could he not? (451) A. Yes, sir; certainly.

Q. In your letter of January 31, you also sent full size detail 178? A. Yes.

Q. Look at this paper and see if it is full size detail 178? A. It is.

Q. This is the one you sent to Graham on January 31, 1907? A. It is on No. 178 and I said in my letter that I was sending 178, so that this is the one. Here is the mark here

(indicating) that it was received back from the architects on January 26, 1907.

Q. On this there are printed the words under the dome "42 feet radius". Could not Graham have told, if he had looked at this detail in January, 1907, that the radius of the dome was to be 42 feet and the diameter 84 feet? A. He certainly could.

Q. The letter of October 4, 1907, from Graham to you, which we have been discussing begins "In starting to lay off setting plans on drum wall of dome, I notice a discrepancy between 'Quarter plan through Triglyphs' on F. S. D. No. 176 and the other drawings." Graham received plans 176 in January, 1907. Did he need any further information from you in order to make up his setting plans correctly? A. No, sir.

Mr. Hill: We ask for the production of the original of setting plan No. 20 prepared by Mr. Graham and marked "Approved October 21, 1907". Have you that gentlemen?

Mr. Harley: We have turned everything that we have over to you.

Mr. Hill: I then offer in evidence a blue print copy of the setting plan No. 20 asked for. The one offered in evidence before was marked "Approved January 29, 1908."

Q. Look at this and say whose signatrue that is and when that setting plan was approved? A. This setting plan No. 20 was approved October 21, 1907.

Q. Look at that plan and state whether in that plan the diameter of the dome was set forth correctly? A. It was.

(452) Q. At how many feet is it shown? A. 84 feet.

Q. Please explain the relation of this blue print approved by you October 21, 1907, to this tracing approved by you January 29, 1908. Each of them is marked setting plan No. 20. A. It shows that this blue print was made prior to October 21, 1907, because the blue print has the photograph reproduction of my approval written on the sheet of that date. It indicates further that the drawing was retracted and that this is not the original tracing from which the blue print was made. It was traced over again to introduce probably some little corrections.

Q. If you can state, tell the jury the difference betwen these two plans? A. As I have said it is evident that this is a new tracing, traced from the original tracing, because this blue print shows what the previous tracing was in detail, it being a photograph of it. Now, there are some little changes

which indicate that it was either a new tracing or some additions upon it. The draftsman in Mr. Graham's office has indicated here that the drawing was made on October 8, 1907, and under that is written "Corrected January 24, 1908."

Q. What diameter appears on each of these? A. 84 feet. There is no difference in that.

Q. Are the lengths of stone shown correctly on the one marked "Superceded"? A. This blue print has upon it in red pencil marks the word "superceded". It looks as if I wrote it there myself. It appears to be in my handwriting. It is also written here in lead pencil "Original". So either this tracing is a new one made from the original or it has had put upon it—which it is easy to do—some additional stones or some changes in the figures of the stone.

Q. Does it show any additional stones over the superceding one? A. It shows a little additional stone in two courses here (indicating) around the drum of the dome.

(453) Q. Doesn't a comparison of the blue print marked "Superseded" and bearing upon it the endorsement "Approved October 21, 1907," and the tracing marked "Approved January 29, 1908", show that in the preparation of the first setting plan an error had been made by Mr. Graham or his draftsman in the quantity of stone shown upon the course?

Mr. HARLEY: Objected to as improper as to form and improper redirect examination.

To the propounding of which question the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to answer said question.

(Exceptions noted.)

A. It shows that this is a new tracing. The original tracing evidently from which this blue print was made bears my approval marked "October 21, 1907". The similar approval marked and placed upon the new tracing in a similar spot shows that there was no previous signature or approval marked on that. That is perfect evidence to my mind that this is a new tracing made from the original one and that the stones are corrected upon it.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their

twenty-first bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Twenty-second Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their twenty-second bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:
(454)

To the witness, BERNARD R. GREEN, still under re-direct examination.

Q. Here are three protographs. Please look at these photographs and say if you know what they represent and when they were received at your office, if they were received? A. These photographs were taken in quarry from which the stone came——

Mr. HARLEY: Do you know that, Mr. Green? I object, if your Honor please, unless he can answer that question.

The COURT: What do you know about that?

The WITNESS: They were taken from the Thompson-Starrett Company's quarry in Bethel, from which this stone was taken.

Q. (Mr. HARLEY) How do you know that? A. Because I am familiar with the quarries and there could not possibly be another spot on the face of the earth that could be so much like that.

Q. (Mr. HARLEY) Do you know who took the photographs? A. No, sir.

Q. Do you know when those photographs were taken? A. No, sir.

Q (The COURT) Do you know if these photographs correctly represent the quarry as you know it? A. Yes, sir; they may have chipped it around the stone or taken out a few stones, but those three photographs were taken in that quarry. They could not possibly have been taken anywhere else.

Mr. HARLEY: Have you offered them in evidence?

Mr. HILL: They are in evidence as far as we know.

Mr. HARLEY: Then we note exceptions to their admission.

The COURT: Do you propose to adduce further testimony in regard to those photographs?

Mr. HILL: Yes, sir.

The COURT: Well, don't show them to the jury until you do that.

Q. Look at this letter and see if you received it A. I did.

Mr. HILL: I offer this letter of February 11, 1907. (Reading) (455)

"Dear Sir::

The first car load of stone from the quarry at Bethel reached my yard on the 13th inst.

The patterns are extremely rough, causing me to pay a large amount of unnecessary freight.

As a rule rough stone never runs more than an average of 225 lbs. to the ft. and often a good bit less. This stock we have just received, run according to my freight bill about 295 lbs. to the ft.

A great many of the stones are also full of seams.

Stone E 1 instead of running 6'-7" does not make more than 6'-3" in length, making the stone 3½" short.

Respct.

F. F. GRAHAM."

Q. Here is the claim for extra freight for rough stone sent you by Mr. Graham. Look at this statement and say if this schedule pretends to show the average pounds in one cubic foot that should have been charged against the car referred to in this letter which you have just read? A. It shows 206 pounds it should have been charged.

Mr. MCLANAHAN: That is the average he makes on here that the carload should have run, 206 pounds.

Mr. Sandels: In this paper which is produced by the Government is the statement by Mr. Graham, showing the number of cars in which the average was 10 or under, showing that he used the average at 10. The jury will look at the whole exhibit. The paper is in evidence.

Mr. McLanahan: We have no objection to the jury looking at it.

The Court: This is as slow as cutting granite.

Mr. Harley: We note an exception to your Honor's remarks.

The Court: That is your privilege.

To which action of the court in using to counsel for the defendants in the presence of the jury the language "this is as (1561) slow as cutting granite" the defendants and each of them then and there excepted and prayed the court to sign and seal this, their twenty-second bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Twenty-third Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their twenty-third bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

To the witness, Bernard R. Green under re-cross examination.

By Mr. Harley:

Q. Now, Mr. Green, please look at this No. 20 again, will you please, sir. You say you have approved that on Oct. 21-1? A. Yes.

Q. Is that your signature? A. Yes.

Q. Was it correct when you approved it? A. I think it was, yes, sir.

Q. Was it? A. Well, it was, I suppose. The best I can tell it was. I approved it as correct, yes, sir.

Q. You thought it was correct then and you think it is correct now? A. It was correct at that time for what it was.

(157) Q. It was correct at that time, was it? A. Yes, I said I thought it was and that is the reason I approved it. I do not say that is absolutely correct.

Q. Now, Mr. Green, as to this detail drawing, let's get that straight. When Mr. Graham bid he didn't have this, did he? A. No, I think not.

Q. Don't you know he didn't. A. I say that he didn't.

Q. What he had were those original drawings, is that right? A. Those are part of them, yes.

Q. Part of them? A. Yes, sir. You understand that in making the bids the bidders had the right to come to the office and make examination and inquiries there. I do not know whether he did that or not. He may have seen them at the office. It was not one of the sets furnished, or sent out by mail to the bidders.

Q. Did he ever see it as far as you know? A. Before he took the contract?

Q. Yes? A. I do not know whether he did or not. I could not say.

Q. The difficulty was that this did not agree with that? A. With what?

Q. This drawing did not agree with that. That put the diameter at 80 feet and this put it at 84? A. In that particular point, it did not.

Q. And when Mr. Graham found it out, he invited your attention to it? A. Yes.

Q. That is correct, is it not, sir? A. Yes, so he says in his letter. He said you found it out; I do not know what the fact was. He had the drawing long enough and he could have
(158) found it out a good while before.

Q. Well, how is it you did not tell him about it in this letter of October 9, 1907, when you merely say in answer to his letter: "I have been away for two or three days and now notice your letter of the 4th instant. Bringing up the fact that the granite dome of the dome of the Museum building has been made 84 feet instead of 80 feet in diameter. This was done early in the period of the contract when the architects worked up the detail drawings and I know of it at the time, but, failing to call it to your attention then I have not thought of it since." How is it you did not tell him that when you wrote him that letter? A. Did you ask me a question? Let me understand what you would like to know.

(Question repeated.)

A. I think in the letter I say I did not think of it.

Q. You did not think of it? A. No, sir.

Q. In answering his letter of October 4th in which he directed your attention to this disparity, you did not blame him at all for it? A. I wasn't blaming anybody; I do not know that I was. I would never blame Mr. Graham about anything in particular.

ALBERT L. HARRIS, a witness of full age, having been duly sworn, testified as follows:

By Mr. McLANAHAN:

Q. What is your full name? A. Albert L. Harris.

Q. Your residence, Mr. Harris? A. Washington, D. C.

Q. And what business are you in, sir? A. A practicing architect.

Q. How long have you been in that business? A. Some-
(459) thing over twenty years.

Q. Will you tell us some of the contracts that you have been engaged in as architect during those twenty years? A. You mean some of the work I have been engaged on?

Q. Yes, that is it. Just give us the important ones. I do not mean all of them—just a few of the important ones? A. One of the first of the important ones was the Court House across the street. I was a draftsman at Wyatt & Nolting, and worked on the interior finish of that building. A short time after that, I went to Washington and went with Hornblower & Marshall in connection with the work on the Baltimore Custom House, and after the letting of the contract for the foundation of the superstructure I was made head draftsman of the office and remained with them during the work on the Custom House, and then took up the matter on the Museum Building which we were running together. I had been with them about nine years, and at the time of the death of Mr. Hornblower in 1908, I was head draftsman, and at his death I was made a member of the firm and have continued the business of the firm with Mr. Marshall.

Q. You were then, at the time it has been testified to by Mr. Green as the time during which this contract was entered into with Mr. Graham, the head draftsman of the firm of Hornblower & Marshall? A. Yes.

Q. State what were your duties in connection with this contract of Mr. Graham? A. I had charge of the office, which was the getting out of the drawings for contract, the roughing of the specifications, the requirements for the building, the checking of the contract drawings before they went out, and the subsequent checking of all shop drawings, which were required under the contract as part of the contract work.

Q. In speaking of shop drawings, are they the same that have been referred to in evidence in this case as setting plans? A. Shop drawings and setting plans are synonymous terms practically. They are simply called shop drawings because (160) they are made at the shop of the stone contractor and he sometimes calls them setting plans.

Q. All of those plans that are put in evidence are the ones you refer to as shop drawings which you were to direct, are they not? A. Yes.

Q. So then you had charge of the plans and checking them up on this contract? A. Yes.

Q. Now, just tell us what different plans, what different kinds of plans, there were in connection with this contract? How many sets of plans and tell us what each set of those plans were? A. The first set of course, was the contract set, a setting plan of $\frac{1}{2}$" scale and elevation, $\frac{1}{2}$" scale of the detail drawing of the building, and the specification formed the original contract drawing upon which the contract—

Q. Are they the plans, some of which are shown on the wall there? A. These are the $\frac{1}{2}$" scale detail drawing.

Q. Go up there and explain them. A. The full sized details, of which this was a form of supplemental set of drawings to the contract drawings, and which explained them, and gave more detailed information as to the principal architectural members of the building, particularly with reference to the bases, capitals and cornices, ornamental members and sections, such as the cornice of the dome, and explanatory of the small scale drawings and $\frac{1}{2}$" scale detail.

Q. There has been a word mentioned in the testimony in this case, the word "ashlar", what do you mean by that word? A. The ashlar refers to the plain stone work on the plain courses similar to the plain work in the end pavilion of the building across the street as against ornamental molded work on doors, or caps. The plain portions of the building, the (161) plain wall surfaces are called ashlar.

Q. Are any full sized details made up, or were they in this case made up, for any of the ashlar work? A. None whatever.

Q. Are they ever made up in any contract? A. Very seldom, unless there is some special detail to be covered by some special case. The vertical heights are figured on the drawing and the horizontal plan is divided into—

Mr. McLANAHAN: Will you kindly talk louder so that the jury can hear you?

A. It is very rare that a detail is ever made of the ashlar work.

Q. In this contract there were no details to be made of the architectural work, were there? A. No full sized details, no.

Q. Will you point out on that drawing there, and also on the photograph, just what parts of the building require full sized details? A. The column bases, pilasters, the bases rather of the columns and pilasters, the column and pilaster caps, the architrave, the cornice, the large archivolt over the arch, and this portion through the cornice, and the section through the main portion of the cornice.

Q. Will you point that out on the drawing? A. Full sized section will have to be divided for this entire portion of the work through the pediment cornice, through the archivolt there, also through the pier, through the main cornice and architrave and this particular point here (indicating). A full sized detail is ordinarily made but in this case a full sized pilaster mould was furnished and full sized details were made of the bases and also full sized details were made of the upper head and drum.

Q. Point out on this picture which were the full sized details? A. The column bases, a 3" detail was made ¼ full size of the columns. Full sized details were made of the archivolt.

Q. What does that mean? A. That is the large molding (indicating) that runs around the semicircular arch through the cornice of the pediment and through the entire cornice and blocking course. That is the bottom course of stone work on the dome.

Q. You can show that a little clearer on that, can you not? A. They are pretty well hidden here by the dome. This is the cornice here (indicating).

Q. For this part of the work were there any full sized details necessary, this plain work here and there? A. No, sir.

Q. None whatever? A. No, sir.

Q. Or for this back here (indicating)? A. No, sir.

Q. In all, how many full sized detail drawings were there connected with this contract? A. I think twelve.

Q. Can you give us the numbers of them? A. I think so.

Q. Let us have them? A. No. 165, 166, 167, 168, 169, 172, 174, 176, 175, 178, 196, 197—

Q. 196 and 197, what are they? A. 196 and 197 were 3" scale details of column caps and pilaster capitals, and 208.

Q. Have you any number in that list of 181? A. 181, yes, sir.

Q. What does that refer to? A. The full size details of the soffits, beams or panels on ceiling of portico. That was the full size details of this portion of the work which this is a plan of looking up underneath.

Q. That is looking at it endways from here (indicating)? A. That is the cross section on that line.

Q. And No. 208 is the full size detail of what? A. (165) Full size detail of pilaster necking.

Q. And what is the third set of plans that was necessary for his work, or any other set of plans? A. The contractor's setting plans.

Q. Are they all the different sets of plans that are required on this work? A. Practically, yes.

Q. Can you mention any others? A. I do not know of any others, no, sir.

Q. And those, you say, are the same that have been offered in evidence in this case? A. Yes.

Q. Before the setting plans were prepared, was or was it not necessary for the contractor to have the full size details on those portions of the work where full size details were required? A. Not necessarily.

Q. He may go ahead and make the setting plans without those full size details? A. He can. The information is on the 3/4" scale drawing within a fraction of an inch, practically all the information he wants that forms the basis of his contract, and the full size details are merely an elaboration and a larger scale of the details than called for on that sheet.

Q. Now, if you know, will you kindly state when Mr. Graham had in his hands all the full size details that were necessary here, excepting 208, the pilaster cap, of which I will ask you later. If you do not know, of course you cannot state it? A. I do not know of my own personal knowledge when the drawings were sent to Mr. Graham by Mr. Green. I know when they were finished by our office and have the dates in connection with that in my possession.

Q. When were they finished in your office? A. They were practically complete by the last of January, everything.

Q. Of what year? A. 1908.

(166) Q. 1908? A. 1907, I should say.

Q. On the original contract drawing, is there anything to show the length of any particular stone in the courses on those drawings? A. The length?

Q. Yes, rather the dimension of the stone, each particular stone, on those contract drawings? A. The height of the courses are all given on the detail, as the heights of the ashlar courses, as also the necessary dimensions to determine the ashlar between the pilasters. The centres of the columns are marked—the distance between the centres of the columns are given on the small scale drawings, as also the larger scale drawings.

Q. But is there anything to show the dimension of the stone on the contract drawing, each particular stone, except

the height of the courses given? A. Each particular stone is not figured. It is not customary to figure it on the contract drawings.

Q. Whose duty is it to make up the actual dimension of the stone? A. That is the contractor's; it is part of his contract.

Q. And he puts that in what? A. He puts it in his course drawings.

Q. That is the same thing as a setting plan? A. Yes, sir.

Q. Have you looked over the setting plans, or course drawings, or shop drawings as you call them, that have been offered in evidence in this case? A. I have looked them over yes.

Q. Will you state whether or not they are in accordance with the requirements as set forth in Mr. Green's letter to Mr. Graham of October 20th, 1906, as to form?

Mr. HARLEY: As the letter is in subject to exception, we will except to the question also.

The COURT: Very well.

(165) Mr. MCLANAHAN: I do not know that it is in subject to exception.

Mr. HARLEY: Yes, that is in subject to exception.

Mr. MCLANAHAN: The paragraph of the letter which I will read is as follows: "In the meantime, however, it is very important that you should enter upon the vigorous preparation of the setting plans, of the work for the examination of the architects and my approval. In making the plans, I think it best to adhere to the same designations of courses by letters which appear in the architect's plans. As to the numbering, it seems to be best to make one series for each course from left to right as you face the building. The drawings should be on tracing cloth this time, instead of paper, which you used for the Court Yards. The scale of the plans should be 1" to the foot and they should consist of elevations and a plan of each course in full, not a perspective or isometric representation such as you have used in the Courts."

A. They were not made in accordance with that direction?

Q. In what way? A. They were made in isometric form, a sort of mechanical perspective, the view of each stone occurs.

Q. I hand you one of the setting plans and ask you to show what you mean by perspective or isometric form? A.

Well, the drawing is made with the actual lengths of the sides drawn up with reference to each other, and each course representing a cut through the building instead of a straight horizontal plan. It is hard to define, and probably I can illustrate it better by drawing it (Witness here takes pencil and paper and draws the plan in explanation of his answer.)

You can see what an isometric plan is there (indicating) better than I can explain it as against what would be ordinarily a plan, a straight line plan. If you can give me one of the small scale drawings, I can illustrate it even still better.

(Paper handed to witness)

Instead of a perspective view drawn out in that form, which shows not only the face but the plan in the small plan, (166) only the top surface or cut surface would be shown. In this isometric form, it shows not only that top surface but also the vertical surface showing the two faces of the stone instead of one.

Q. Step down here and find us what you want.

(The witness here leaves the stand and gets a certain drawing.)

A. This represents a small plan, which is a small plan cut right straight through the building showing only the top surface of some particular cut in this building. But this shows two surfaces. In this case, it shows not only the cut through the wall, but also the vertical surface of the wall in one plan. That is the difference between the isometric view and the plan view.

Q. Can you show us an illustration of just what you mean by the plan view for any plans that you may have? A. The one that I just pointed out will show it.

Q. That shows you the top view looking from the top? A. Yes.

Q. How do you get at the side? A. By a direct elevation.

Q. Similar to that on the wall? A. Yes.

Q. How many actual plans—the elevation for each course would then be the same, but all the courses would be contained in the same elevation? A. In making an elevation?

Q. Yes. A. It would be exactly like that (indicating). The elevation would be one plan showing the entire vertical face and a plan of any particular course would be the top surface of that plan cut on that line looking down on top of it.

Q. How many plans would have been necessary for Mr. Graham to have furnished setting plans for if he had made them

in this elevation that you speak of? A. As referred to in Mr. Green's letter?

Q. Yes, as required by his letter. Can you say how many separate drawings would have had to have been made? A. (467) If he made them according to the directions given in Mr. Green's letter, he would have an elevation of the return face back to the wall; he would have an elevation showing in one drawing from the floor of the porch to the under side of the cornice on the inside, one elevation of the return back into the portico. If he had gone to the center of the building it would have taken three plans to have covered everything to the first floor line to the under side of the cornice.

Q. It would have taken three plans for that? A. Yes, that is three elevations. It would have required in addition to that probably two or three plans in horizontal sections to explain the depth of the ashlar as he went along.

Q. Could they all have been put on one sheet of paper such as those used here? A. That quarter scale?

Q. Yes. A. I judge so, I am not sure that you could put it in on one sheet.

Q. How many at the most would it have required at the outside, how many sheets? A. What I just covered?

Q. Yes. A. Two sheets would have taken it easily.

Q. Then would he have had to make an elevation for the other side of the building? A. The only parts on the other side would be the four face of this.

Q. You said it would take four elevations from the corner of his work to the centre there. Would he have to make another elevation for the other side? A. No, sir; that is entirely symmetrical.

Q. One side would have done for both? A. Yes.

Q. How many would it have taken up through the dome? (468) A. Practically two elevations would have done for this part of the work, for the pediments themselves, because the three roofs which come in this side are exactly the same and one condition given here would apply for three faces of the dome. This would be the only case (indicating) which would be a little different from the other three faces.

Q. On the whole, would he have had to submit as many plans, if he had drawn them up in the form which you have just mentioned than in the form in which he did draw them up? A. I do not think so; I think it would have been very much simpler for him.

Q. What can you say as to the checking of the plans in the form which you have just mentioned, as compared with the checking of them in the form in which he submitted them? A. The checking would have been very much easier and could have been done in very much less time.

Q. In what time after the contract was entered into should he have had the setting plans all in, what time should Mr. Graham have had them in?

(Objected to.)

The COURT: In what reasonable time?

Mr. MCLANAHAN: I will make my question read "What would have been a reasonable time for Mr. Graham to have had the setting plans in after the time the contract was signed?

(Objected to; objection overruled; exception noted.)

A. In my judgment I should think it should be reasonable to expect everything in within two months, or 2½ months at the outside.

Q. What is the usual form for furnishing setting plans that you have come across in your experience of twenty-one years in architecture?

Mr. HARLEY: What is the usual form?

Mr. MCLANAHAN: What is the customary and usual form?

Mr. HARLEY: We object to that.

The COURT: Objection overruled.

To the propounding of which question the defendants and each of them then and there objected; but the court overruled (169) said objection and permitted the witness to answer said question.

(Exceptions noted on behalf of both defendants.)

The WITNESS: The usual form is the form as stated in Mr. Green's letter.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their twenty-third bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Twenty-fourth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their twenty-fourth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

To the witness, ALBERT L. HARRIS, still under direct examination:

Q. Did you ever see this form used before? A. I hadn't *see* until Mr. Graham's plans were submitted.

Q. And that was the first time you ever had to check over any such form as that? A. Yes.

Q. Now, will you explain just why the checking of these isometric drawings was harder than the checking of an elevation drawing? A. Let me have one of the drawings.

The WITNESS: This drawing represents three distinct courses of the building which Mr. Graham was to make shop drawings for. They are so related to each other that it is necessary for the man who checks them to be very careful in checking one over the other to be assured that the vertical jointing, which forms an important part of the work, that the vertical (470) jointing shall come directly above each other. That requires the man who checks the drawing not only to check this course he is on, which he may have completed in conformity with the drawing, but when he checks this course up, he has got to come back to this one every time to see whether the jointing is directly over the one below. Whereas, in direct elevation the form of the drawing would indicate immediately that it was above the stone. Therefore, it took more time for those shop drawings than it would have taken for any other drawings submitted for check.

Q. We have heard in evidence here the word "template." What does that mean and what is it used for? A. A template is usually made of a molded surface and consists of a section through the cornice. This is a full size detail through the main cornice of the dome.

Q. Is it a cross section of the cornice? A. It is a vertical cross section of the cornice. That is a full size detail through this part of the cornice of the dome.

Q. It is taken as a cross-section, is it not? A. Yes, vertically, and a template has been made from this drawing in which you can see the holes punctured along there, and it is principally made of zinc, or galvanized iron, and consists of cutting the profile of this molding in zinc. This molding is to be used as a pattern by the stonecutter in drawing his work, and is to

be rested up against the stone he is cutting. It is simply a pattern by which he does his work.

Q. Is a template necessary for the quarrying the stone? A. Not at all.

Q. It is never used in quarrying? A. In special cases it may be used, but ordinarily not.

Q. Would it be required for this (indicating) as shown here? A. No, I think not.

Q. Would a template be necessary for the preparation of any setting plan in connection with this contract? A. Not at all.

(171) Q. In some of the letters it mentions the full size profile. Will you state whether or not that is the same as a full size detail drawing? A. Ordinarily it means the same thing. A full size detail may be an elevation. A profile is a section through that elevation.

Q. I hand you setting plan No. 1. Mr. Green testified that from the stamp on that plan that the first time that he received the plan appeared to be December 8, 1906, and in the cross examination it was shown that this plan was mentioned in a letter from Mr. Green to Mr. Graham of November 27th, 1906, as being sent back from Mr. Green to Mr. Graham. Can you state, or will you explain just what happened to No. 1 setting plan, if you know? A. I can give you my general recollections of the conditions that existed in connection with No. 1 at the time it came over.

Q. Give us that. A. When sheet No. 1 was first submitted it was submitted on paper, and if I remember correctly, it was in pencil for check by our office. We had considerable difficulty in checking it up owing to the fact that the contractor had allowed for the thickness of the joint in his measurements, and in an effort to correct his figures, and check them up to ascertain their correctness, we got into some difficulty with the small fractions of an inch. I did not check that particular drawing as I remember it now, but seeing the condition of it after it had been gone over, I decided to send it back to the contractor in order that he might bring up or revise his drawing with the help of the information that we had given and resubmit it for final approval if the dimensions were found to be correct when the drawing came back.

Q. Is that the second sheet which he gave you purporting to be the drawing of the courses mentioned on that? A. I cannot say definitely that this is the second sheet.

Q. But it isn't the first? A. No, sir; it isn't the first.

Mr. McLANAHAN: Have you the first drawing, Mr. Harley, that he testified to?

(172) Mr. HARLEY: No, sir.

Mr. McLANAHAN: I now hand you setting plan No. 7 and ask you to state, after examining it, whether or not No. affected in any way the courses in the building above it—or let me put that question this way. Was it necessary to have No. 7 approved before setting plans for any of the courses above those called for in No. 7 could be prepared? A. Not absolutely necessary, no.

Q. Well how necessary was it?

The WITNESS: You mean in the preparation of the course plans?

Q. Yes, the setting plans? A. It was absolutely unnecessary as far as that is concerned. All of the course drawings from No. 7 cover particularly this strip of the building which includes the pilaster caps. All of the work from there up could have been gone ahead and finished and approved without referring to this particular sheet.

Q. It has been shown in evidence that there was some time consumed between the time when No. 7 was originally put in and the time when it was finally approved by Mr. Green. Will you just tell us what the history of No. 7 was during that time so far as you know it yourself? A. The first and most important reason why the work on sheet No. 7 was not approved was due to the fact that we were trying to be satisfied in our own minds as to the detail of the column caps and pilasters. The order—when I say order I mean architectural order—which consists of the column and capital was the Roman Corinthian, and the model from which we were working was the Temple of Jupiter at Rome. It was very important for the architectural effect of the building that the columns and caps be made as nearly correct as possible, and everything that our office could do to make these columns and caps as fine as possible was to our advantage and the advantage of the building as an architectural monument.

Three and one-half million dollars were being spent on the building and this was the principal portion of the design (473) and any fault architecturally on so important an architectural detail would be a blemish to the building.

Mr. Hornblower, who went to Europe early in the summer of 1907, about the time that the drawings were being completed for this section of the building, came across in Paris a model of a capital of Jupiter Stata. I might explain at this point that there are nothing but remains left of the old order at Rome and this particular model was built up of all the definite information that could be obtained in reference to this column and capital.

When Mr. Hornblower came home he told us that he had bought this capital and that it was expected almost any day. The contract, in the meantime, had been let. In some way or other the capital became lost. Nobody knew where it was and it wasn't until May, I think, 1908, that we received word from the Custom House in New York—the latter part of April or the first part of May we received word from the Custom House in New York.

Q. What year was that? A. In 1907. We received word from the Custom House in New York that the capital had been shipped to the Custom House in Baltimore, Georgetown. Owing to delay in finding the capital, we had gone ahead with a model so as not to hold the contract up any longer at this particular point. We had gone ahead with the model and had it practically finished when we received this one. Then we checked the model that was practically finished with the dimension of the plaster model from Paris and found so many discrepancies in the projections, heights of leaves, etc.

Q. I show you this and ask you what it is? A. This is a photograph of that model that was brought in Paris by Mr. Hornblower. We found so many variations in the measurements between the detail height of the leaves, the size of the volute, the projection of the volute with reference to the width of the column, that we decided to abandon the first model entirely and revise our detail and make a new model that conformed very closely to the model which Mr. Hornblower had bought. This, by the way, was the exact pattern of the column used in Rome. Our capital was, I think, somewhere nearly a foot less in the detail height and we had to readjust all the proportions of the leaves and in the width, in order to conform to the model that Mr. Hornblower brought from Paris. This, (171) necessarily for the architectural good of the building, held up this particular course, and in our opinion as architects of the work, we thought it would be extremely detrimental and foolish to attempt to put through anything but the best that we could at that particular place, and therefore that portion was held up until we got the actual model made to determine the proportions and size of the stone work at that point.

Q. Did this change in the model of this stone in any way change the work which Mr. Graham was to do in roughing out these stones that were to be made into these capitals? A. It changed the size of the stone slightly from the original contract drawing.

Q. About how much, if you know? A. And it increased the overall width of the stone at the top, which is the widest portion of the cap, 9 or 10" more than the contract.

Q. Did it increase any other dimension of the stone? A. No, sir.

Q. Did it increase the height? Did it increase what is called the rise? A. No, sir. (It is hereby agreed that said original photograph may be used before any court in the trial or in the argument or at the hearing of this case.)

Q. Mr. Harris, I hand you setting plans Nos. 20, 21, and 22, which, according to the evidence, were all submitted on the same date. Will you look at those three plans and say what the diameter of the dome was as called for by those three plans? A. The diameter is shown to be 84-feet.

Q. Is that No. 21 you have there? A. This is No. 22; this is No. 21 and this No. 20.

Q. On all three of them the diameter is 84 feet and they were submitted, drawn on October 12th, 1907? A. It is October 11th on this No. 20.

Q. And this one is October 12th (indicating)? A. Yes.

Q. Will you kindly state where the courses as shown on Nos. 21 and 22 come in the building with respect to No. 20? (175) A. If I understand your question exactly they come directly below the courses shown on sheets Nos. 21 and 22.

Q. The course on No. 20 is directly below the courses shown on sheets 21 and 22? A. Yes.

Q. It has been testified here in evidence that the blue print which I now show you is a copy of the original tracing of plan No. 20 which was afterwards superceded by the tracing on Plan No. 20, which I handed you a moment ago. Will you state what the diameter of the dome as shown on that blue print is? A. 84 feet.

Q. Will you state, if you can do so, what the difference is between the plan shown on the blue print and that shown on the tracing which I handed you a moment ago? A. There are some corrections made, or additional information and changes made on this second sheet or tracing that are not shown on the first one.

Q. What are they, point them out if you please? A. Well, there are a couple of stones added on this sheet in the course D. B. that are not shown on this sheet at all.

Q. Why were they added do you know? A. No, I cannot state why those particular stones were added unless it was found afterwards necessary to put them in there to finish out the stone work to the roof line. That is the only thing. This particular course D. A. and D. B. come down at the lower part of the drum of the dome where the two roofs meet, and the course D. B. was right at that intersection, and in order to get enough stone to cover inside under the roof so that the stone would be there, it was found necessary to add that stone. Why it was not on the original, I do not know.

Q. Can you state whether or not the failure to put those stone in there was an error on the first drawing? A. I should (476) think it was.

Q. And whose error was it, if it was an error? A. That I cannot answer.

Q. Who prepared those plans? A. Mr. Graham.

Q. From your inspection of No. 20 can you say whether or not the man who drew that up knew that the diameter of the dome was 84 feet at the time he made that plan? A. I should think so.

Q. Why did he know it? A. The dimension as on the drawing itself, would indicate that he knew of the fact that the drum of the dome had been increased from the original 80 feet to 84 feet.

Q. Just how is that indicated? A. The fact that his actual figures on the drawing from the centre to the outer radius is 42 feet from the center to the outer radius—

Q. And the diameter is twice the radius? A. Yes.

Q. Which is 84 feet? A. Yes.

Q. And he must have known that? A. Yes.

Q. Mr. Harris, it has been testified here, that Mr. Graham had cut the medillions. Will you kindly state just what the medillions are, how big they are, and where they are located, and show us if you can just where they are there on that plan on the wall, or in this picture? A. Well, we have a full size detail of the model which will show the whole thing. In the $\frac{1}{2}$" scale drawing, the medillions are the ornamental projecting blocks which support the upper members of the cornice and occur along there. They have a scroll out on the side and a leaf, in addition to a scroll and a leaf on the underneath side. (477) Q. Can you show them to the jury on this picture? A. The medillions are the stones lying in there.

Q. How many cubic feet are in each medillion, about, if you know? A. I cannot get up on that drawing to measure how much, or how far, it extends back in the wall. I measure this projection now. The medillion extends back in the wall, underneath the cornice, probably as much as it projected beyond the face. Assuming its projects in the wall, as much as it does beyond the face, it is probably $7\frac{1}{2}$ cubic feet to a medillion. Say there are eight feet in each medillion.

Q. Cubic feet? A. Yes.

Q. How many medillions were there? A. I will have to have the $\frac{1}{2}$" scale side elevation in order to get the medillions on the return.

(The witness here leaves the stand and counts number of medillions on blue print on the wall.)

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That would be 35 in all, if I have counted them correctly.

Q. 35 medillions in all? A. Yes.

Q. That is all the way around? A. Yes.

Q. That is the total number of them? A. Yes, sir, that is the total number of them, if I have counted them correctly.

The Court: There are three on each return.

The Witness: Yes, three on each return and 29 along the face.

Q. Can you figure out how many cubic feet make up, in total, all of the medillions? A. That would be 280 cubic feet according to my figuring.

Q. How many cubic feet, for instance, are there in one of those columns? A. In one of those columns?

Q. Yes, just one of them. I do not want all of them—just without the cap? A. The columns are about 35 feet long, and then I made a very rough approximation of the amount (378) of the stone, of rough stone, it would take for the columns. It would be in the neighborhood of 525 feet. That is only a very rough guess at it.

Q. 525? A. Yes.

Q. How many columns were there?

Mr. Gaither: Cubic feet?

A. Yes.

Q. In one of the columns? A. Yes.

Q. How many columns were there? A. There were eight.

Q. Eight columns? A. Yes. I hope you wont check up those figures too closely.

Q. How much stone was in the portico ceiling—how many cubic feet of stone is in the portico ceiling? A. I would have to take each stone to give you that and it would take some time.

Q. Will you look at setting plans which I now hand you for the Z courses, which have been offered in evidence; it was testified here that there was a certain correction made in the Z courses. Will you explain just what that correction was, and if you can do so, tell us first of all just what that correction was, it appearing, I believe, the correction runs all through the Z courses and starts with plan No. 9—it runs through four or five of the Z courses? A. There are two questions involved in these drawings that you have submitted to me. The first is with reference to the Z course and the second with reference to the—that is with reference to this course (indicating) and it is a different question from the one involved above that point. I do not know which one you want first, or do you want both of them.

Q. We will take the Z course first; suppose we get that? (479) A. The contractor in submitting this sheet made a mistake in checking the information for this course off the full size details.

Q. Was the full size detail correct? A. The full size detail was correct in this respect. There was a modification in the full size detail from the scale dimension on this drawing so that this drawing would not be absolutely correct in this particular. Where the mistake was made was in connection with the face of this stone in connection with the friezes. The full size detail figured that face of this stone back of the face of that frieze 13". The contractor assumed that condition applied everywhere and made his drawing through here on that basis. These corrections were made in his drawing when it came to our office.

Q. How many of the Z courses did that run through? A. That affects only the first course, that particular correction. That would also affect the course immediately above it, through here (indicating).

Q. Now, will you tell us about the false jointing up there in the course just a little higher up. That is a different matter from this particular trouble? A. That matter of the false jointing, the question brought up in these drawings is due to the request of the contractor to change these particular 1, 2, 3, 4 and 5, courses. The contractor in a certain letter asked that this stone be turned around end for end.

Mr. HARLEY: Let us have the letter.

Mr. MCLANAHAN: The letter is in evidence in which he asks to have the stone reversed.

(480) Mr. MCLANAHAN: When we were closing yesterday, Mr. Harley asked me for a reference to a letter which you referred to in your testimony. The letter is from Frank E. Graham to Bernard R. Green under date of August 17, 1907, and is already in evidence. I will read you the first part of the letter which refers to the question I asked you, namely, as to the false jointing in Z 4 course. This is the letter from Mr. Graham to Mr. Green:

"In laying out setting plan for Course Z 4 I find at the outer angles of pilasters to front gable, over the base at Attic floor, the ashlar is 6' 6" long on the face with a returned head 5' 4 3/4 16". This is an awful size for ashlar and I respectfully ask for permission to change this by simply reversing the stones on face of pilaster as shown on enclosed sketch, thus having a long stone with a short head on each alternate course."

Will you show where Z 4 is, where that stone is that was referred to and what was done about that stone? A. Z 4 is the second stone above the base of the pediment—what is the size he gives in his letter?

Mr. McLANAHAN: Six feet six inches is the whole size of the stone.

The WITNESS: What is the returned head?

Mr. McLANAHAN: (Reading): "With a returned head of 5' 4-3/16"."

The WITNESS: The returned dimension was something over five feet.

Q. (Mr. McLANAHAN) What is the returned dimension?

(481) A. That is the distance from the face of the pier back to this main line of the building, that is the projection of this part of the building in front of the portion immediately back of it. It is the projection of the pediment in front of the main line of the building.

Q. And it is 5 feet 4 inches back to the main part of the building? A. Yes. Mr. Graham's contract is based on this drawing, and the other drawing of the set, and he is required by his contract to furnish stones in accordance with these drawings. The size of the stones is not unusually large for the building. There are other stones in the upper part of the building which are larger than this one and require more stock to get it out of and they are more difficult to handle. In order to accommodate Mr. Graham as far as possible we were perfectly willing to change the jointing of the pier on this side and on the other side, but to do that it required the rejointing of this entire pediment, because if we put the head on this side (indicating) it threw that stone there (indicating), and if we divided this into two stones it left this space here (indicating). When the question came up I took it up with Mr. Green and we decided to make these stones smaller for his benefit. We replaced all the vertical joints in the pediment and that brought about a change in the false joints; there is one mark in there where the stone runs out into the angle and becomes a little bit of a sliver where the line here runs out and the full size detail shows the manner of overcoming that by cutting out the main cornice line to give more thickness. That was done en-
(482) tirely for Mr. Graham's benefit.

Q. That affected how many courses? A. That changed 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 courses.

Q. All these jointings had to be changed on account of the shift in this stone? A. Yes, sir; the stone is right there, you will notice that there is a header shown in the photograph and the full size detail shows the long stone something over six feet long.

Q. You say it shows a header, what is that? A. That is the end stone, the stretcher stones are the longer.

Q. And how does that original plan call for that stone? A. It is to be six feet long there and with a header return back here.

There (indicating) is the case exactly. There is the main line there. This stone is six feet long there with a return end of something over five feet that way. That makes a very large stone, undoubtedly, but that is the basis of his contract; but in order to accommodate him we were perfectly willing to change the jointing around and make it possible to use the smaller stones.

Q. So you reversed the stones? A. Yes, we did that for his benefit.

Q. Mr. Harris, from your experience, can you tell us whether or not these rearrangements of stone that you have testified to are ordinarily and usually met with in the course of (183) the completion of contracts of this size and character? A. The modifications which have been made all through this contract and which have appeared are only such as are met with in every contract, no matter whether it is a small or a large one. Readjustments are always taking place between the contractor and the architect's office, readjusting stones for the benefit of the work in every way. Sometimes it is for the benefit of the contractor and sometimes it is in the interest of the builder or of the architect or owner, whichever it may be. But the slight changes made are such as are ordinarily met with in the prosecution of any kind of contract or work.

Mr. McLANAHAN: That is all, if your Honor please.

Cross Examination.

Q. (Mr. GAITHER) Mr. Harris, first we will take up that Z course. You have said all you have to say about why that change was made?

The WITNESS: The Z course?

Mr. GAITHER: Yes.

The WITNESS: Which course do you speak of?

Mr. GAITHER: The one we were just speaking about. You said that was a mistake of Mr. Graham's.

The WITNESS: I did not say it was his mistake.

Mr. GAITHER: You said it was done at his request or instance.

The WITNESS: Yes, so I understood.

Q. It was not a mistake of yours? A. No, sir.

(484) Q. Let me read you this letter of August 22 from Mr. Green to Mr. Graham. (Reading)

"Sir:

"The suggestion in your letter of the 17th instant, as shown by the tracing therewith, for the arrangement of corner stones for the Z courses in attic, is approved."

That is, this particular stone you are referring to, is it not? A. Yes.

Q. (Reading, continued)

"In fact the original drawing by the Architects was laid out that way, but got changed in the tracing by mistake."

A. That is correct.

Q. So it was changed by mistake in your drawings there, is not that what this letter says? A. Yes, but that is right only in substance, but not in fact. Can I explain it?

Mr. GAITHER: When I get through.

The WITNESS: I can explain that if you will let me.

Q. (Reading continued) "As to the correction in course Z, I did not consider them as caused by any mistakes of yours,—they pertained to the architects' work." A. The upper portion refers to the original drawing made in our office from which this was traced and has nothing to do with a mistake of the architect or the contractor. This plan here is the basis of the contract, and this is what the builder or contractor asked to be (485) changed. There is no other drawing except as this indicates.

Q. Was that in your office made in the same way Mr. Graham finally drew it?

The WITNESS: What, this (indicating)?

Mr. GAITHER: No, I say in your office, before you drew up that blue print.

Mr. McLANAHAN: If the architects drew up some other plan, but submitted this copy to Mr. Graham, then we submit that anything that the architect may have done but which was changed before Mr. Graham received it to bid on, has nothing to do with this case here.

The COURT: Proceed.

Mr. GAITHER: Answer the question.

The COURT: I hope the jury understands it. It is very cloudy to me.

Mr. GAITHER: I am asking him if the stone was not changed in the tracing from the architect's original drawing.

The WITNESS: No, sir; this is correct. I will explain it if you give me a chance.

Mr. GAITHER: Just you answer the question.

Mr. HILL: Read the question.

(The question referred to was then read by the stenographer.)

A. There was no change in this drawing, which is the contract drawing. The original drawing which was made in the office and from which this drawing was traced, had the reverse scheme of drawing on it, but that had absolutely nothing to do with the contract. As originally laid out it was on the basis (486) as we finally arranged the building but it was not made with any intention of cutting down the stones in any shape or form. It was simply another scheme of jointing. It did, however, bring in another scheme which made the return jointings smaller. When this letter came we decided that in order that Mr. Graham could have the benefit of the smaller stones we would change it in accordance with the original drawing.

Q. (Mr. McLANAHAN) Was it a mistake on your part? A. No, sir; it was not; this was the original contract (indicating)

Q. (Mr. GAITHER) For whose use are the original drawings made? A. For the contractor's use.

Q. They are set out in the way your walls are to be built, are they not? A. Their only use in the contract is for the benefit of the stone man himself.

Q. Don't they show primarily the exact location of every stone in the wall? A. They do.

Q. And are they not to show the exact size of every stone and what stone must be in the wall? A. Practically, yes.

Q. And therefore they must show what the walls are to be after they are built? A. Yes, sir.

Q. And you have them in your office—they are called (487) setting plans, are they not? A. Yes, sir.

Q. And they are for the purpose of showing how those stones are to be set when you get them from the contractor? A. Yes, sir; you might say that.

Q. And they are numbered and lettered? A. Yes, sir.

Q. Then, what use are they to the contractor?

The WITNESS: What use are they?

Mr. GAITHER: Yes.

A. In the first place they formed the list of stones which he must receive from the quarry before he can cut any stone whatever in his yard.

Q. If he is to furnish the stone himself he has nothing to do with the quarry, has he?

(488) Mr. HILL: We object to that.

Mr. GAITHER: Why, this man comes here as an expert.

Mr. HILL: But I object to the question.

The COURT: I sustain the objection.

Mr. GAITHER: I reserve exceptions.

Q. If a setting plan was being made for us by a contractor who was to furnish the stone himself, then there would be only two persons interested in the setting plan, would there not?

Mr. HILL: Objected to.

The COURT: Overruled.

Mr. HILL: We note an exception.

The COURT: I cannot very well see the ultimate bearing of this.

Mr. GAITHER: I will show it in a moment, sir. I want to show for whose benefit these setting plans are.

The COURT: The setting plans were required to be made by the contractor and submitted to the superintendent of construction for his approval?

Mr. GAITHER: And I want to show the reason for that approval.

The COURT: Can't you do it more directly?

Mr. GAITHER: I think this will bring it out more clearly to the jury.

The COURT: It is not for whose benefit it was. The plans were necessary under the contract, and the contractor was to prepare them and submit them for approval and he was then to use them in his work.

Mr. GAITHER: Will you read the question, Mr. Stenographer?

The COURT: It seems to me the contractor was to furnish the stones.

Mr. GAITHER: Of course, but I want to make this clear.

(The stenographer then read the question referred to.)

Mr. HILL: I object to that question.

The COURT: Overruled.

(189) The WITNESS: Are you speaking of the setting plans furnished for this building.

Mr. GAITHER: I say if the contractor was to furnish the stone as well as do the cutting.

The COURT: Would not the quarryman have to have some guide?

Mr. GAITHER: But the quarryman would then be the subcontractor.

The COURT: Then it is whether the contractor was both the quarryman and was to furnish the stone.

Mr. GAITHER: That is the point.

The COURT: Well, he would have to get it from somebody?

Mr. GAITHER: I mean anybody who would have any share in these setting plans.

The COURT: Anybody who would use them?

Mr. GAITHER: Yes, sir.

The WITNESS: I don't see what he is getting at in this question.

Mr. GAITHER: You are only to answer the question.

The COURT: But he must understand it before he can answer it. It seems to me this is pretty plain. These setting plans are for the purpose of furnishing the dimension of the stones and their location in the wall. They are necessary, I suppose, to the contractor who is to do the cutting?

Mr. GAITHER: That is right, sir.

The COURT: They are useful to the quarryman who cuts out the stone.

Mr. GAITHER: Yes, sir.

The COURT: They must receive the approval of the Superintendent of Construction so that the work when done will be satisfactory.

Mr. GAITHER: And he has already said that the person who is to set these stones will know how to set them.

Q. (Mr. GAITHER) If the contractor is to furnish the (490) stones and do the cutting on them are these setting plans of any importance except to himself and the person for whom he is doing the work? A. I can see many circumstances that would modify that question in a thousand different ways.

Q. Answer the question yes, or no. A. If you will explain what you are getting at then maybe I can answer yes or no.

Q. You cannot answer the question better than that? A. Well, I don't see how I can unless you make it more plain.

(491) Q. There is no reason why you as the architect could not have drawn the setting plans for this whole building, was there?

Q. You have gone over all these setting plans and examined them? A. Yes; I have gone over practically every one of them.

Q. And you approved them? A. I did not put my name to every one of them; no, sir; but I did go over them with my draughtsman and checked them up and I made any corrections that were necessary.

Q. You went over them to approve them, didn't you? A. No, sir; I did not approve them; Mr. Green approved them.

Q. But you went over them to change them or recommend their approval to Mr. Green? A. Yes, sir.

Q. Then, why do you make detail plans? A. For the further elucidation of the work. For the more correct outlines of the architectural members, so that the contractor may make his templates, from which the work is done.

Q. You do not send them to him to prepare his plans? A. Sometimes, yes.

Q. Suppose there is a difference between your original plan on which you say he made his bid—

The WITNESS: Yes.

Q. And the detail? A. That very often happens.

Q. Then, which one governs? A. Generally the full size detail.

Q. Wouldn't it be the duty of the contractor to call your (492) attention to it instead of taking a chance on that? A. It certainly would.

Q. Is not that what he did about plan No. 20 about the diameter of the dome? A. Yes.

Q. That is just exactly what he did, is it not A. As far as I know of the correspondence. The correspondence between the contractor and the Superintendent of Construction, Mr. Green, did not come to our office at all.

Q. But the setting plan was sent to you? A. Yes, sir.

Q. And didn't you have knowledge that he said there was this inconsistency between the two? A. I do not think I saw the letter. When the drawing came to the office the diameter was correctly marked so we had no knowledge but that the contractor was aware of the fact from the very beginning, but as I remember correctly the stones themselves were figured on the smaller dimension on the 80 foot diameter and not on the 84.

Whether there were any letters passing between the contractor and Mr. Green's office in reference to the fact that the drum of the dome had been increased, I cannot say.

Q. I ask you whether or not when they came to you there was not some notice given you by Mr. Green that there was this question about the 84 feet? A. None whatever.

Q. What was the size of the original drawings? A. (493) Eighty feet.

Q. On the contract drawings? A. Yes, sir.

Q. That is the one on which you say he was to base his contract? A. Yes, sir.

Q. You went over that drawing in October and recommended it for approval, didn't you?

Mr. HILL: What drawing?

Mr. GAITHER: We are referring to the first No. 20. Let us have the blueprints if he does not remember it.

The COURT: It does seem to me, Mr. Gaither, that this is a great deal of investigation about a point which is not disputed in any way. There was this difference in the diameter which was discovered and corrected and an allowance was made to the contractor for the extra stone.

Mr. GAITHER: But this witness was called here yesterday and asked to show that there was this mistake of two stones in the plan No. 20 and he said that this mistake was a mistake of the defendant. Now we certainly have a right to cross-examine him when they brought the question up.

The COURT: But it was admitted that the increase was made and that there was an allowance agreed to be made for it to the contractor.

Mr. GAITHER: But this was delivered approved in early October and we will show that this was approved as originally presented to him.

The WITNESS: The fact that the final drawing may have had two stones more on each corner—that would make eight (494) stones altogether—is a very possible mistake to be made in checking the drawing. We may have overlooked the fact that two stones were necessary there, and it is a mistake that the contractor could make.

Q. You both made it then? A. Yes. Owing to the fact that the stones mentioned are down in the lower drum of the dome between the two roofs it is quite possible in checking the

thing over that the two stones could be omitted, but I don't see—

Q. You don't see anything in that at all? A. No, sir; I don't see anything in that at all.

Q. And you approved it in October? A. Yes, sir; I did. It was approved by Mr. Green and I probably recommended to him to accept it.

Q. You said you had never noticed setting plans of this particular character.

The WITNESS: You mean the setting plans as a whole?

Mr. GAITHER: Yes.

A. I have never met such plans in my life.

Q. You approved all of them, did you not? A. Yes, sir; under protest.

Q. Did you protest to Mr. Graham? A. I was not the executive officer.

Q. Well, I object to your testifying to what you said to Mr. Green. Just you tell what you said to Mr. Graham. A. Through Mr. Green I did say so.

Q. Did he ever protest about it to Mr. Graham? A. Yes, sir; he did in the first one written he asked him to (1955) make those drawings in the ordinary manner with scale plans, and I insisted on that being done.

Q. That was done in November, 1906, when the first plans came? A. Yes, sir.

Q. And that was with reference to plan No. 1? A. That was in reference to the plans as they came.

Q. And you approved them from that up to No. 28? A. Yes, sir; I did because I had to, but not because I wanted to.

Q. Didn't these plans as you say contain more detail than the plans which you wanted? A. It showed unnecessary detail.

Q. The only difference was that it took you longer to check them up? A. Five times as long.

Q. How much time would it take you to check up that particular plan?

The WITNESS: That particular plan?

Mr. GAITHER: Yes.

A. That would take about three or four hours, I suppose.

Q. And the other way it might take you how long? A. The other way practically in the same time we could have checked the entire done if it had been made properly.

The two elevations would have developed the whole thing.

Q. So it made a difference to you of a few hours? A. Well, a few hours in my office is worth money.

Q. I suppose it is, and you make people pay for it. Now, (496) look at this plan and tell the gentlemen of the jury how much of Mr. Graham's contract in proportion to the part above (indicating) is expressed down to the tops of those pillars.

The Witness: How is that again?

Q. Just state to the gentlemen of the jury how much in proportion to Mr. Graham's whole contract to furnish this granite and so on is the portion up to this point here (indicating to witness and to the jury)? A. This is the point you mean (indicating)?

Mr. Gaither: Up to that point there, to the top of those piliars.

The Witness: Up to this point.

Mr. Gaither: Up to the top of the pillars, yes.

The Witness: You mean what proportion of the entire contract this here (indicating) would probably be?

Mr. Gaither: Yes.

The Witness: The number of cubic feet of stone?

The Court: The work that Graham was to do, you mean?

Mr. Gaither: Yes, what proportion of the stone he was to cut of the whole contract, what that proportion is.

The Witness: That is merely a matter of judgment.

Mr. Gaither: I presume you are a good judge of those things.

A. I should think somewhere in the neighborhood of one fourth, one-quarter of his contract.

Q. One-quarter of his contract up to that point. Now, how much is in this upper part (indicating)?

The Witness: How much is in this upper part?

(497) Mr. Gaither: How many courses are there up to there (indicating), can you tell us? A. Yes, one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen,

fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, to this point it is 21 courses.

Q. And how many above it? A. There are 29 courses of ashlar up to that point.

Q. (The COURT) That is the plain faced stone? A. Yes, sir; then there is the corners and the other courses above that and the corners of the main pediment.

Q. How many courses of the plain stone above? A. I have counted, I think, 29.

Q. Tell us which were the largest stones of that contract?

The WITNESS: The largest stones?

Mr. GAITHER: Yes.

A. The largest stones in the contract occur in this big cornice (indicating).

Q. Aren't some of the largest stones in the ceiling? A. I don't think they are as large as in that cornice (indicating).

Q. Aren't there a number of them in the ceiling too? A. Yes, there are some pretty good sized stones there, but I doubt very much if there is anything as large in the cornice—in the ceiling—as takes the size and block and weight of these stones here in the cornice.

Q. How many cubic feet can you calculate are in the ceil-
(1981) ing of this building?

The WITNESS: I can calculate it for you if the court wants me to stop.

Q. Haven't you any data that shows that? A. No, I never made such a calculation at all.

Q. I don't mean to hold you down to an accurate statement of this, but you see these stones here? A. Yes, sir.

Q. Can you calculate them for us? A. I can. I am capable of doing it.

Q. I presume you are, as you checked it up, but we don't want you to take five hours on it, but we ask you can you give us approximately within ten cubic feet of it.

The WITNESS: As a matter of judgement?

Mr. GAITHER: No, can you measure it?

The WITNESS: That is the ceiling?

Mr. GAITHER: Yes.

A. That is composed of different sized stones, and unless the court will let me figure it out I would not want to make a statement of it.

Q. I want to get the amount of cubic feet, in your judgment, that there was in that ceiling? A. I won't give it in this form, not unless the court directs me to figure it out.

The COURT: You won't make it with sufficiency accuracy, is that it?

The WITNESS: No, it would be foolish to do that.

Mr. GAITHER: Will you do that for us later, after you (499) leave the stand?

Mr. MCLANAHAN: I will state that we have another witness whom we will produce and who can give the figures as to the ceiling.

Mr. GAITHER: All right, that will save time.

Q. (Mr. GAITHER) Now, you testified about plan No. 7 yesterday. Do you mean to tell the gentlemen of the jury of the jury that if you had changed the vertical size of those pilaster columns that it would not have affected the upper courses of this building? A. I don't say so.

Q. I am asking you that question.

The WITNESS: That involves considerable possibilties.

Q. Can't you answer the question yes or no? A. No, I will not answer a question of that kind because it involves the matter of the whole building. I will answer it in this way—

Mr. GAITHER: Answer yes or no.

The COURT: I think he is entitled to answer it in the best way he can.

Q. (Mr. GAITHER) I ask you whether or not if you changed the height of those vertical stones it would not have changed the upper courses of this building?

Mr. MCLANAHAN: Now, first Mr. Gaither said something entirely different.

Mr. GAITHER: I said the pilasters.

A. It would not affect any work above if the entire building was raised the amount which you increased the height of the building in the capital. But if you assume that the building cannot be raised the amount which you raised the cap-
(500) ital, then of course it would have to be taken up somewhere.

Q. When did you approve all the Z courses? A. I could not tell without looking at the drawing; I have not the date in my mind.

Q. How long did you say it would have taken you to have gone over this plan if it had been in the ordinary form? A. That plan could not have been made in any other way, that particular plan. That particular plan is made in the proper form.

Q. But how long would it tke you to go over that plan and correct it up and verify it?

The WITNESS: That plan?

Mr. GAITHER: Yes.

A. Ordinarily I would think it would take a man about a day to check it up.

Q. On that plan as it is? A. Yes, sir.

Q. And that is on the flat plan? A. Yes, sir.

Q. Instead of on the isometric view? A. Yes, sir.

Q. Now, take an ordinary plan—take this plan No. 1 that gives you three courses at the same time, doesn't it? A. Yes, sir.

Q. That is much easier to do than if you had one course? A. No, sir; not at all; it is three times as hard to check that as it would be one course; because each course has to have an
(501) independent drawing—

Q. Well, how long would it have taken you to check up this if it had been submitted in the way you wanted it? A. The time it took to check that drawing if it had been submitted properly we could have checked the whole thing up to here (indicating).

Q. I am asking you how long it would have taken you to have verified and checked that plan up if it had been submitted in the way you wanted it? A. Well, one-third of how long it takes there in that way.

Q. How long would it have taken in the proper form?

The WITNESS: How can I answer such a question without a comparison

Q. You cannot tell the jury if this had been in the proper form how many hours it would have taken you to check it? A. Well, nobody can tell that.

Q. Nobody can tell that? A. No, sir.

Mr. GAFFNER: That is the only answer you can make to that. Well, I think that is all we want to ask you.

Re-Direct Examination.

Mr. HILL: Mr. Stenographer, will you read the question that began, I am asking you how long it would have taken you, &c.

(Question referred to was then read by the stenographer.)

Q. (Mr. HILL) Explain that. A. This drawing shows three courses of the work and it includes 1, 2 and 3; that is all (502) it shows. There is a whole sheet with a lot of drawing on it and it only takes that much of the building (indicating). I took, in my opinion, as much time to check that drawing as it stands, as it would take to check that much of the drum if it had been put in proper form.

Q. (Mr. McLANAHAN) Mr. Harris, in your cross-examination you testified that you first made a drawing showing that stone which we are talking about in the course as being slightly smaller, that is in the very first study you made in your shop. Was that original drawing in which that stone was smaller ever submitted to Mr. Graham? A. He never had anything to do with it.

Q. Did that ever get into this contract at all? A. In no way whatever.

Q. What was the form of the drawing which was submitted to Mr. Graham? A. Just as it stands there now.

Q. You testified that you checked up under protest these drawings in this isometric form. Can you tell us why you did that instead of insisting on an elevation? A. Because Mr. Green, in order to get ahead with the work as quickly as possible, asked me if I would not assist him in that way as much as I could and check it as quickly as I could under the circumstances.

Q. Were the pilaster caps shown in No. 7 raised at all? A. No.

Q. Had not all the heights of the drawings been set in (503) that drum? A. Yes, sir.

Q. Were any of the heights of the drawings changed? A. No.

Q. Was there any proposal to change any of the heights? A. No.

Q. How many courses are there in the drum of the dome?

The WITNESS: How many courses of plain ashlar or including cornice and everything else—

Mr. McLANAHAN: Including the cornice.

A. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 courses.

Q. You have testified, I believe, on cross-examination, that it would have taken about the same length of time to check that whole dome as it would No. 20;; is that correct? A. Pretty near as much time. We could practically have checked the entire dome with its isometrical and developed elevation made—the dome being cylindrical like that (indicating) and symmetrical on four faces, it is easier to figure the actual length of the curve developed; and starting with one-quarter or one-half of the curve developed, the entire coursing could be laid out and checked as one sheet instead of as a number of sheets.

Q. How many plans did it take to show all those courses in the dome, do you recall? A. That I cannot say. There were six or seven on the table there.

Q. And you say you could have checked those six or seven in the same time as you could the whole dome? A. If it had (591) been in proper form, yes.

RE-CROSS EXAMINATION.

Q. (Mr. GAITHER) What do you call a day in your office? A. Seven hours.

(Examination concluded.)

WILLIAM PIRIE, a witness produced on behalf of the Government being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. McLANAHAN) What is your occupation, sir? A. I am at the present time a foreman in a stoneyard in Washington, D. C.

Q. What stoneyard? A. The stoneyard of the Washington Granite Monumental Company.

Q. How long have you been employed in that stoneyard? A. At the present time—I have been working there since last September.

Q. Whom were you employed by during the fall of 1906, during all of 1907 and 1908 and up until June, 1909? A. I was employed by Mr. Bernard R. Green.

Q. And what was your employment by Mr. Green? A. In the fall of 1906 I was inspector of stone in Milford.

Q. Connecticut, is that? A. Milford, Massachusetts, and (505) in 1908 I came to Mr. Graham's yard. I believe no, 1907 and part of 1908, I was in Mr. Graham's yard.

Q. Doing what? A. I was inspector of this stone under this contract.

Q. Whom were you inspecting it for? A. For Mr. Bernard R. Green.

Q. When did you go to Mr. Graham's yard about? A. About February, 1907, I think.

Q. What were your duties as inspector at Mr. Graham's yard? A. When the rough stock arrived from the quarry I was supposed to see that it was all there; look it over in a general way and see that it was fit to cut the stones from for which it was intended. Then I had to sign the invoice and forward it to the office in Washington, D. C.

Q. How long were you at Mr. Graham's yard? A. From about February, 1907, until in March or April, 1908, when Mr. Graham abandoned the work.

Q. (Mr. McLANAHAN) Why did you leave Mr. Graham's yard? A. I left Mr. Graham's yard to go to Washington, D. C., and fit up and make preparations for receiving the stone there and finishing the contract.

Q. How long did Mr. Graham continue work on his contract? A. From about February, 1907, until March 5 or 6, 1908, I think.

Q. Had he finished the contract at that time? A. Oh, no.

Q. What happened then? A. Mr. Graham stopped work (506) on that contract.

Q. And after he stopped work then what did you do? A. I held my desk and office for some little time looking out as well as I could for the Government's property.

Q. That is in Mr. Graham's yard? A. In Mr. Graham's yard, until Mr. Green found something else for me to do, and I went there and did as instructed.

Q. What was it Mr. Green found for you to do? A. Well, he wanted me to look around in different places and see if I could find room where we could take the work up again.

Q. Where did you finally take the work up again? A. A. We finally took it up on the side of the building at Washington, D. C.

Q. In connection with your duties in Mr. Graham's yard while you were there, what did you have to do with regard to the shipments of stone that were sent to Mr. Graham?

The WITNESS: The cut stone?

Mr. McLANAHAN: No, the rough stone.

A. I was supposed to look the car over when the car arrived and see that it was all there, see that it was suitable to cut the stone from which it was intended to make; also to look the invoices over in general and see that they were all right and sign them and return them to the office.

Q. Sign them and return them to the office where? A. In Washington, D. C.

Q. Where did the invoices come to you, from the quarry, (507) or from Washington A. They came from Washington to me.

Q. And then you signed them and returned them to Washington? A. After receiving the stone I signed them and returned them.

Q. And you checked up each invoice, did you? A. I did.

Q. Mr. Pirie, will you take these papers which I hand you and state to the gentlemen of the jury what they are, if you know? A. Yes, sir.

The COURT: Do you wish him to read these?

Mr. McLANAHAN: No, sir; we simply offer them in evidence and we want him to look them over quickly and say what they are. We will then put them in evidence and submit them for whatever cross-examination they desire. We have a tabulated paper of them here.

The COURT: Well, state what they are.

The WITNESS: I recognize these as being the invoices of one carload of rough granite delivered to Mr. Graham—

Q. (Mr. McLANAHAN) Will you just look at those invoices as a whole and see whether or not you have examined them and whether your name is signed to each one of them? A. My name is signed to the invoices. That is, the invoices are in duplicate and my name is signed to one only.

Q. Will you explain what that duplicate is, state what the purpose of the duplicate is. A. The quarry company for-
(598) warded to Washington, D. C.—

Q. Mr. Pirie, I ask you to look at these invoices again and state now how many loads they represent from the quarry to Mr. Graham's yard? A. They represent 165 carloads, I think.

Q. Now, are you sure of that? A. Well, I think I am.

Q. And between what dates do those show? A. Well, about February 11, 1907, and March 5 or March sometime, 1908.

Q. Now, I ask you again to explain as to the form in which these invoices came to you. Explain why they were in duplicate. A. The quarry company made the invoice when they shipped the car and they were forwarded to Mr. Green, I believe, in duplicate or perhaps in triplicate.

Q. Why were they sent to Mr. Green? A. Because the company was furnishing Mr. Green with the stone.

Q. First of all the quarry sent the invoices in triplicate to Mr. Green? A. I think so; yes, sir.

Q. And Mr. Green sent you how many of them? A. He sent me one, which I have in my hand, and I think he also sent a copy to Mr. Graham's yard.

Q. He sent you two, then? A. Yes, I think so. I kept one and turned the other over to Mr. Graham and I signed one. This is my signature.

Q. Is your signature on all those invoices? A. I think
(599) so.

Q. Have you examined them recently? A. Yes, sir; I have examined them recently. I find it on that one (indicating) and on this one, and I find it on this one.

Q. When did you examine those and look over them last? A. Last night.

Q. Now, when you looked over them last night was your signature on all of those invoices? A. Yes, sir; on all these invoices.

Mr. McLANAHAN: Now, if your Honor please, we offer all these invoices in evidence, showing 165 loads and signed by Mr. Pirie and the duplicates by Mr. Bailey.

(It is hereby agreed that the original invoices referred to above may be used at the hearing or in argument in this case before any court.)

The COURT: He was the inspector at the quarry?

Mr. McLANAHAN: Yes, sir; he was the inspector at the quarry.

The COURT: Did this witness testify whether the stone called for in these invoices arrived at Graham's yard?

Mr. McLANAHAN: I will do that in a minute.

Q. Was the stone showing on all these invoices shipped to Mr. Graham's yard or to Washington, first? A. It was shipped to Mr. Graham's yard.

Q. And none of the stone that was shipped direct from the quarry to Washington after Mr. Graham quit work here in Baltimore is shown on any of these invoices? A. Not on (510) any of them.

Q. Can you state whether or not all the stone shown on these invoices was received at Mr. Graham's yard? A. I think it was.

Q. Why do you think so? A. Because we signed the invoices showing that it was received.

Q. Did you sign any invoices when you did not receive the stone? A. No, sir.

Q. Did you examine personally every carload of stone that came in there? A. I did.

Q. And did you find that correct with the invoices? A. I found them correct in most cases. I found in one or two cases that there was stone missing, and we referred the matter to Mr. Green and the stone was looked up. They had thrown it off the car and put it on another car and by and by we received it. Then there was another small piece reported missing and I don't just remember how we got it, but we got it some way or other.

Q. Were there any other stones other than these two mentioned which were missing on all this lot of invoices here? A. Not any that I remember of.

Q. Do you know Mr. Bailey's signature on the invoices? A. Oh, yes.

Q. Is that his signature (indicating)? A. That is his signature.

Q. Mr. Pirie, will you look at the papers which I now hand (511) you and state to the jury what they are? A. I recognize these papers as being the invoices for stone which Mr. Graham cut and forwarded to Washington.

Q. They are the invoices for the finished stone sent from Mr. Graham's yard to Washington? A. Yes, sir; they are.

Q. While he was doing the work here in Baltimore? A. Yes, sir.

Q. How many invoices are there? A. This shows 69 loads. This is the 69th invoice and I think that was the last one.

Q. Mr. Pirie, have you examined these invoices recently? A. I have examined them.

Q. Can you state whether or not your signature appears to all of these? A. I can; that my signature appears to all these invoices.

Q. I notice on this one which I hold in my hand that there is an O. K. by F. R. Freas, Master Mechanic; who is he? A. He was the master mechanic at the Museum building.

Q. What was your duty as to the signing of these invoices of cut stone sent by Mr. Graham to Washington? A. Examined the invoice and when I found it correct, to sign it.

Q. Correct with what? A. Correct with the location and the number of the stone. The addition and all correct, and then I signed it.

Q. Does each of these invoices represent a carload? A. (512) Yes, sir.

Q. And you checked up the number of cubic feet and saw whether the stones were properly cut or not and when you saw that you signed it? A. Yes, sir.

Q. If you know, why did Mr. Freas' signature appear on these? A. Mr. Freas received the stone and I suppose when he received it he signified in that way.

Q. Do you know whether or not he kept check on the stones received in Washington? A. I think he did.

Q. On this invoice which I have there appears certain figures in red ink with "F. R. F." underneath them. Will you explain what they are?

Mr. HARLEY: If he knows.

Mr. McLANAHAN: If you know.

A. That figure (indicating) is quarry cube. We received the stone by quarry cube and we shipped it by quarry cube, but when it went to the building Mr. Freas went over the dimensions—

Q. (Mr. HARLEY) Were you there? A. No, sir.

Mr. HARLEY: Then, let Mr. Freas tell that.

Q. (Mr. McLANAHAN) Will you tell us just what the difference is between quarry cube measurements and dimension cube measurements? A. Quarry cube is nothing less than 12 inches. In cubing a stone you take net dimension less

that 12 inches. If it is less than 12 inches you call it 12 inches. If it is 6 inches or 5 inches on the plan you take that, (513) but if it is the quarry dimension and it is 6, 8 or 10 inches, then you call it a foot all the time.

Q. Now, I notice in this invoice that there is a column marked "cube" at the top, is that quarry or dimension cube? A. All these black figures are quarry cube.

Q. Is that also true with regard to the invoices which came down from the quarry to Mr. Graham's yard? A. That is exactly true of the invoices that came to the yard from the quarry.

Q. In all these invoices both from the quarry to Mr. Graham's yard and from Mr. Graham's yard to Washington, do all those measurements in that column represent quarry cube measurements? A. All the invoices were received with quarry cube on them.

Q. Now, as to those invoices sent from Mr. Graham to Washington, are all the black figures on these invoices quarry cube measurements? A. The black figures are quarry cube.

Q. Have you prepared a summary showing the totals taken from these invoices, showing the number of cars which arrived each month with the amount of stone on each car, and if so, please produce it? A. I think this statement here shows that (handing paper to counsel).

Q. Will you look at this paper and state when you made that up? A. I made that in March, 1908.

Q. Why did you make it up? A. Well, I made it up to (514) show how much stone was received a month and also how much was cut per month.

Q. Have you added anything to that statement since that time? A. Yes, I believe I have added a little something to it.

Q. Show what it is which you have added to it. A. On June 12, after the stone was taken from Mr. Graham's yard to Washington, D. C., I believe there were 13 stone in Mr. Graham's yard cubing 9 feet six inches and I added that to Mr. Graham's statement.

Q. Have you finished stating why you made up this statement? A. Yes, I said I made it up to show how much we received and how much was cut.

Q. And whom did you show it to? A. I may have showed it to Mr. Graham.

Q. Did you state it to Mr. Graham? A. No, I don't know, because he was not on the work. There were others about the office—

Mr. McLANAHAN: I offer this paper in evidence and I will read from it the stone as received first from the quarry

and then after that I will read showing the stones as sent to Mr. Graham's yard and the details of all those are shown by those invoices already offered in evidence. This shows the number of shipments and the cubic feet of rough stone received per month, the number of cars and the amount cut and shipped to Washington. (Reading) "In February, 1907, there were received one car, containing 26 stones or 333 cubic feet 3 inches. In the same month there were shipped to Washington (515) ton no cars. In the month of May there were received in Baltimore three cars containing 13 stones or 705 cubic feet 1 inch. During the same month there was shipped to Washington one car containing 26 stones or 306 cubic feet 10 inches. In June there were received in Baltimore 9 cars containing 110 stones or 1,890 cubic feet 6 inches and shipped to Washington five cars containing 98 stones or 1,651 cubic feet 2 inches. In July there were received in Baltimore 13 cars containing 220 stones or 3,008 cubic feet 10 inches and shipped to Washington 6 cars containing 153 stones or 2,061 cubic feet 11 inches.

Q. Now, do those figures represent the total received (indicating)? A. That (indicating) is the total for July and that is for September.

Q. And what is that? A. That is the total to the end of July.

Mr. McLANAHAN: The total received to the end of July was 5,937 feet and eight inches, and the total shipped to Washington was 4,025, eleven inches.

Q. Now, in estimating the cubic feet in the stones as they came down to you from the quarry, what was that estimate based on? A. Was it based on the dimension of the rough stock or on the finished stone? A. It was based on the figures as shown on the drawings.

Q. They are the finished figures, are they not? A. Yes, sir; the dimensions on the invoice is the dimension on the plan.

Q. It is taken at quarry cubic measurement but it is on (516) the basis of the stone as finished and not on the basis of the rough stock, is that correct? A. That is correct.

Mr. McLANAHAN: (Reading) During the month of August there were received in Baltimore thirteen cars, with 228 stones amounting to 3,054 cubic feet, 1 inch and during the same month there was shipped to Washington 7 cars containing 199 stones, where equalled 2,528 feet and 9 inches. In

September there were shipped to Baltimore 8 cars containing 118 stones, which was 1,992 feet, 2 inches and during the same month there were shipped to Washington 4 cars containing 131 stones or 1,594 cubic feet, 2 inches. The total there was received in Baltimore 10,983 cubic feet, 11 inches and shipped to Washington, 8,148 cubic feet, 10 inches. In October there were received in Baltimore 23 cars containing 340 stones or 5,993 cubic feet, 8 inches; and there were shipped to Washington during the same month 8 cars containing 219 stones or 3,470 cubic feet, 9 inches. The total up to that time was 16,177 cubic feet, 7 inches, received in Baltimore; and shipped to Washington 11,619 feet, 7 inches. In November there were received in Baltimore 24 cars containing 349 stones or 6,202 cubic feet, 11½ inches. During the same month there were shipped to Washington 9 cars containing 271 stones or 4,852 feet, 11 inches. In December there were received 31 cars containing 455 stones, or 8,337 cubic feet, 4 inches. During the same month, December, there were shipped to Washington, 9 cars containing 271 stones, equalling 5,883 cubic feet, 6 inches. The total was received in Baltimore, 31,517 cubic (517) feet, ½ inch, and shipped to Washington, 29,356 cubic feet, no inches. In January, 1908, there were received in Baltimore 21 cars containing 255 stones or 5,350 cubic feet, 7 inches. There were shipped to Washington during the same month of January, 10 cars containing 290 stones or 4,128 cubic feet, 5½ inches. In February there were received 14 cars containing 149 stones, or 3,164 cubic feet, 9 inches. There were shipped to Washington in February 8 cars containing 185 stones or 3,533 cubic feet, 8 inches. In March there were received in Baltimore 2 cars containing 12 stones or 528 cubic feet, 8 inches. There were shipped to Washington in March 2 cars containing 50 stones or 914 cubic feet, 3 inches. Then follows the total amounts given. There were received in Baltimore altogether 165 cars containing 2,305 stones or 40,870 cubic feet, ½ inch. There were shipped to Washington 99 cars containing 1,896 stones, or 28,932 cubic feet, 1½ inches, and then there were shipped in June to Washington 12 cars containing 13 stones or 99 cubic feet, 6 inches, making a total shipped to Washington of 29,031 cubic feet, 10½ inches. Deducting that from the total received in Baltimore, leaves 11,838 cubic feet, 2 inches.

Q. (Mr. McLanahan) Now, Mr. Pirie, was all the stone mentioned in this statement measured at quarry cube both the stones sent here and the stones sent to Washington? A. All the stones received at Mr. Graham's yard and shipped from there was always cubed at quarry cube.

Q. Both the receiving and shipping of it was measured by
(518) the quarry cube measurement? A. Yes, sir.

Said paper or written statement is as follows:

Number of shipments and cubic feet of rough stock received per month.

Number of shipments and cubic feet of stone cut each month.

	Number of cars	Number Stones	Cubic feet		Number Cars	Stones	Cubic feet	
1907								
February	1	26	333	3				
May	3	43	705	01	1	26	306	10
June	9	119	1,890	6	5	98	1,654	2
July	13	220	3,008	10	6	153	2,064	11
August	13	228	3,051	01	7	199	2,528	9
September	8	118	1,992	02	4	134	1,594	2
October	23	340	5,993	8	8	219	3,470	9
November	24	340	6,202	11½	9	271	4,852	11
December	34	455	8,337	4	9	271	3,883	6
1908								
January	21	255	5,359	7	10	290	4,128	5½
February	11	119	3,164	9	8	185	3,533	8
March	2	12	528	8	2	50	911	3
	165	2,305	40,570	0½	69	1,896	28,932	11½
			29,031	10½	Graham's stock			
Rough stock in yard March 14th, 1908.			11,838	20				
					June 12	13	99	6
Reported March 16th, 1908.							29,031	10½

The above is all Quarry Cube—Not the cut Cube on which Graham was paid.

(519) Q. Now, Mr. Pirie, will you look at the book which I now hand you and state to the gentlemen of the jury what it is? A. This book was a record of contract, No. 25, known as Mr. Graham's contract. There is also other work in it which does not concern this contract. It shows the dimensions of each and every stone in the contract; on this side it shows when it was received, and on that side (indicating) it shows when it was cut, or at least when it was shipped from Mr. Graham's yard.

Q. Does it also show the cubic feet? A. Yes, sir; but it all in quarry cube.

Q. Are all the figures in that book quarry cube? A. Yes, sir.

Q. What is course T up here (indicating)? A. That is course T in the setting plan.

Q. And does it show the number too? A. Yes, sir; that is 9, 10, 11, 12, 13, 14, 15, and so on all through the book.

Q. When did you begin to keep this book? A. When I began the work at Mr. Graham's yard.

Q. How long did you keep it? A. I kept it until the work was finished in March, 1908, at the Museum building.

Q. March, 1908, at the Museum building? A. March, 1909.

Q. So this shows not only the stone cut at Mr. Graham's yard but the stone cut by the Government at Washington? A. It does.

Q. Will you tell how it shows which stones were cut here (520) and what were cut in Washington? A. The stone marked in black ink was all cut by Mr. Graham. There is one here which I see and that was cut at the building (indicating) and that one (indicating) at the building.

Q. (Mr. Gaither) Everything in red ink was cut at the building? A. Yes, sir; in this last column (indicating).

Q. (Mr. McLanahan) I notice here that some are in red ink and some are in blue ink? A. This (indicating) shows that that was received at Mr. Graham's yard and this was at the building.

Q. And I notice over here that over a number in red stamp in the book over the first column there is a little figure written in red ink "Received June 2." A. That means it was received in Graham's yard on that date.

Q. Was that received in Washington finished or unfinished? A. Unfinished.

Q. In Washington? A. Yes, sir.

Q. Is that one of the stones taken over to Washington after the finish of Mr. Graham's work? A. Yes, sir.

Q. Is that one of those you took over? A. I would not like to say that I took it over.

Q. (Mr. Gaither) Whenever January and February appear here in red ink (indicating) that is January and February, 1909? A. Yes, sir; 1909; yes.

Q. (Mr. McLanahan) What dates were those stones fin- (521) ished in Washington? A. January 30, 1909.

Q. That is stone Y-4? A. Yes, sir.

Q. And that was finished January 30, 1909, in Washington? A. Yes, sir.

Mr. McLANAHAN: There (indicating) are the courses here gentlemen of the jury, and the red stamp shows stone received in Baltimore at Graham's yard, the blue stamp shows stone that went direct to Washington after Mr. Graham quit; the black figures show stone in this column finished in Graham's yard and shipped to Washington and the red shows stone shipped to Washington. This shows stone taken to Graham's yard and not finished.

Q. (Mr. GAITHER) Those stones, as a matter of fact, noted in red ink as finished in Washington in March, that was March of 1909? A. Yes, sir. That must be 1909; it could not have been 1908.

Q. In January or February or March those in that red column were finished in 1909? A. Yes, sir.

Q. (Mr. McLANAHAN) What year did Mr. Graham quit work? A. March, 1908.

Q. You finished some stones during the balance of that year, did you not, in Washington? A. Yes, sir; a great many stones.

Q. So that the only ones in this book which could not be (522) 1908, those dates would be January and February and they would have to be in 1909? A. Yes, sir.

Q. Look at this December 5, in red ink, and state if that is December, 1908 or 1909? A. That would be December, 1908.

Q. When was it that Mr. Graham quit work on this contract in his yard at Baltimore? A. It would be the 6 or 7 of March.

Q. March, 1908? A. Yes, sir.

Q. Will you look at this statement and state to the gentlemen of the jury how much unfinished stone there was in Mr. Graham's yard when he ceased to work on these stones? A. According to this statement there were eleven thousand eight hundred and thirty-eight feet, two inches.

Q. Do you know when the loads marked number 68 and 69 in the invoices from Mr. Graham's yard to Washington were received in Washington? A. I do not.

Q. You don't know? A. No, sir.

Q. Do you know when they were sent from this end—from Mr. Graham's yard, these loads Nos. 68 and 69? A. The last load went out on Friday—the 68th load was shipped on

March 4, 1908. The 69th load was shipped on March 5, 1908.

Q. Can you tell from looking at that what date they were (523) received in Washington?

Mr. GAITHER: Do you know that yourself

The WITNESS: I read here "received March 6".

Q. (Mr. McLANAHAN) But you don't know what that refers to? A. I do not.

The COURT: That means the paper was received.

Mr. McLANAHAN: Is that the date when those papers were received in Washington?

The WITNESS: I think it is.

Mr. GAITHER: Has he testified to both of them? He should give the date as to when both were received.

Q. (Mr. McLANAHAN) Will you take this paper and state what you mean by that being received in Washington. That is the invoice for the 68th load. Does that mean that the invoice for the 68th load was received, or that the 68th load itself was received? A. That means that the paper was received.

Q. Now, looking at the paper for the 69th load, does that show when the paper was received or the load? A. That shows that the paper was received on March 6.

Q. Has that anything to do with the 69th load, does it show when the 69th load was received? A. I don't think it does.

Q. Will you look at the book and state whether or not all those stones mentioned in that book as having been received at Graham's yard were so received?

(524) The COURT: What stones?

Mr. McLANAHAN: The sones mentioned in the book as having been received, whether they were actually received? A. I believe they were, the invoices all show so.

Q. Have you checked up the invoices in any way? A. I have.

Q. Can you state whether or not the record of stone cut or shipped from the Graham yard to Washington is correctly shown in that book? A. I think they are correct. When the invoices were made up I checked them up in this respect and they are correct to the best of my knowledge.

Q. Now, as to the stones shown in there as received in Washington from Mr. Graham's yard and finished there, is the book correct as to that stone? A. I believe they are, because the book and the invoices compared.

Q. As to the stone finished in Graham's yard after Mr. Graham quit work over here, is it correct as to those? A. I think so.

Q. How do you know that? A. Well, the stones were invoiced. I take the invoice and find the stone is on the car and I take the invoice to the book and I find that there is a stone on the book and then I find they are correct.

Q. Did you do that with all the stones? A. Yes, sir; I did.

(525) Q. Did you do it personally? A. Yes, sir.

Q. Does that include all the stones in pavilion C, or part C? A. Yes, sir; it includes all the stones in part C, which was known as the Graham contract.

Q. Do you know personally whether all those stones were cut in this part C? A. Yes, sir; they were all cut.

Q. Will you look at this paper and state if you know what that is? A. Yes, that appears to be a letter in my handwriting in pencil.

Q. Do you know what it is? A. Yes, it is a letter of mine, or a copy of a letter, rather.

Q. This is already in evidence. Now this copy mentions certain overweight stones. I believe you have already testified that there were 165 loads of stone sent down here from the quarry? A. Yes, sir.

Q. How many of those 165 loads, if you can recall, had any overweight stone on them, or stones that you considered not altogether correct? A. Referring to my memorandums, I find that I criticized about fifteen or sixteen shipments, that is individual stones in fifteen or sixteen shipments.

(526) Q. Out of the whole 165? A. Out of the whole 165.

Q. Just look at this paper and read it and explain what you mean by the various remarks which you make there?

The WITNESS: Read the whole paper?

Mr. McLANAHAN: Just read it and explain it to the jury.

A. The letter refers to stones that were rather rough in my opinion, and I was writing to Mr. Green, you know, with a view to remedying the same.

Mr. McLANAHAN: I will read the letter.

(Reading.)

Q. What is meant by the net dimension block? A. Well, a stone that would be quarried large enough to cut any of these particular stones out of would be a net dimension block.

Q. Does a net dimension block mean that the rough stone as quarried would have exactly dimension, for instance, as this stone No. 26 in course Z shown here? A. No, sir; if it had the exact net dimensions as it was to be cut to, they would not have room to cut it. Then it would be known to the trade as a scant pattern.

Q. So a net dimension block must be large enough to have the stone cut out of it which is to be used? A. Yes, sir; it must be large enough to allow them to cut comfortably with.

Q. What do you mean by saying here "net dimension block"? A. I mean he was getting them a little too large.

Q. Can you tell us about how much an actual cubic foot (527) of granite weighs? A. About 165 or 170 pounds, according to the granite, as it is weighed.

Q. You are a stone man, are you? A. Yes, sir.

Q. How long have you been in the business? A. Well, all my life.

Q. But about how long in the stone business? A. Forty years.

Q. Where have you worked on any stone? A. In many states and towns.

Q. Have you had any experience in the quarrying of stone? A. Oh, yes.

Q. How much? A. Well, being an inspector on cutting, I have had more or less experience in quarries in all these years that I have been inspecting stones.

Q. Where were you before you came to Mr. Graham's yards? A. I came from Milford.

Q. What were you doing there? A. I was inspector on stones for the Museum building.

Q. The Museum at Milford? A. No, sir; it was the same building at Washington.

Q. And where was the stone coming from? A. From the quarries in Milford.

Q. And you were inspecting the stone at those quarries? A. Yes, sir.

Q. Will you tell us what you think is a reasonable weight (528) of rough stone from which a finished block of one cubic foot in size may be cut?

The WITNESS: I wish you would state that again.

Q. I say, can you tell us from your experience what would be the reasonable weight of a block of rough stone as

taken from the quarry from which you are to cut a cubic foot of finished stone?

The WITNESS: Do you mean one of these stones (indicating)?

Mr. MCLANAHAN: Any of of these stones. That is, the weight per cubic foot of rough stone.

A. According to the stone you were going to cut from it, it would be from 225 to 300 pounds, according to the stone you were going to cut from it.

Q. How would that vary? A. Well, if you will allow me to refer to this drawing here I will explain it. This (indicating) is the stone I wish to talk about. In quarrying one of these square bases which have to be cut full—

Q. (Mr. GAITHER) What is that stone? A. It is the A course. It is a column base.

Mr. HILL: I wish we could conduct our own examination.

Mr. GAITHER: I just want him to identify the stone.

Q. (The COURT) Can you tell the number of the stone? A. Yes, sir; this is known as column base No. 5, I believe.

Q. It is the base of one of the columns? A. Yes, sir; the base of one of the columns, and I believe this is known as No. 5.

(529) The COURT: Proceed.

The WITNESS: And in laying out to get a stone like the one which I have pointed out here full and fine on all sides—

Mr. MCLANAHAN: What do you mean by full and fine on all sides? A. On all the four sides.

Q. (The COURT) That is on all of the sides? A. Yes, sir; to show all around it. It would be necessary to quarry a stone of that kind considerable over the net dimensions while in quarrying a stone like this (indicating) which only shows on one face, it might be quarried with a depth of eight inches and it would not make any difference if it was less than that. Of course, in my opinion, stones like this would cut about 225 pounds per cubic foot, where a stone like this (indicating) might go to 250 or 300 pounds per cubic foot, in my opinion.

Q. Now, you state in this memorandum that a "great deal has been paid by the people who handle that stone, etc." Had you been at Bethel Quarry as inspector? A. No, sir.

Q. Where did you get that information that Bethel granite is easy to split? A. I mean there that it is easy to split after being taken and freed. I don't mean that it is easy to split in the quarry but I mean after it is taken out of the quarry.

Q. You had no experience with it in the quarry itself? A. No, sir; I had very little experience with Bethel granite in the quarry.

(530) Q. You say here that you got this information from men who had worked in the quarries? A. Yes, sir.

Q. (Reading) Now, you say that you mended or patched. Is that at Mr. Graham's yard? A. Yes, sir.

Q. (Reading further) Where is this plant which is referred to in this? A. Northfield, Vermont.

Q. Reading) You speak here of the patterns improving slightly in quality? A. The quality of the stone would improve.

Q. You say that the quality of the patterns improved? A. Yes, the patterns improved; I think it says that as the patterns improved the quality went down.

Q. (Reading) What are the ranges of the H course referred to here? A. They are the piers in the rear of the building.

Q. Where does that come? A. It comes here (indicating) and it would be about that high.

Q. Well, why would a lower quality of stone be there? A. Because it was farther from the eye and on the north side of the building.

Q. That was not the front of the building? A. No, that was not the front of the building.

Q. I have here a letter which was put in evidence from (531) you to Mr. Green, of August 5, 1909, which I will read. (Reading) What does this "third shipment" mean? A. That is the third shipment.

Q. What do you mean by a seam or shake in the face of a stone? A. I mean a crack.

Q. What do you mean by a shake? A. A shake might be done by using the powder in the quarry. It might show a little crack in the stone which would not be discovered by the inspector there and by and by it would show plainly.

Q. Why couldn't it be discovered by the inspector in the quarry? A. Well, in this particular white stone it would not show so well, but when it gets on the car and the dust gets in it, then you can see it just like a pencil mark on the stone.

Q. It is a fine crack then—is that what a shake is? A. Yes, sir; a fine crack.

Q. Now, you have testified that out of all the 165 car loads you made objections on some stones in 15 or 16 of them?

A. I objected to individual stones or fifteen or sixteen loads in the first twenty or twenty-five cars, perhaps.

Q. Can you say on how many car loads which contained the individual stones were the defects in the stones which you made a kick on due to overweight stones? A. Perhaps ten or a dozen. I think there were two or three of those criticisms which I made on account of seams, but not on account of over- (532) weight. Two or three occasions I think I criticized because of the seams or cracks of the stones and the stones had to be replaced.

Q. Did that affect Mr. Graham's cutting in any way? A. No.—I am not aware that except on perhaps one or two occasions Mr. Graham worked a little while on the stones and then the crack was discovered and then we put the stone aside.

Q. So that practically it was only on a dozen of these car loads where there were any overweight stones?

The COURT: A dozen stones he said.

Mr. MCLANAHAN: No, he said there were 15 car loads on which he kicked about some of the stones and I asked him how many out of that total number he objected to on account of being overweight and he said there was about twelve.

The WITNESS: I think out of 15 or 16 cars two or three criticisms were on account of the cracks in the stones or the shakes and the rest were because of overweight.

Q. Now, on these 15 or 16 car loads was the objection to every car? A. No, sir; only to individual stones.

Q. Were there good stones on all 12 of the cars? A. Yes, sir; there were no cars that I saw where the stones were all bad, not one.

Q. Now, you have testified that you made no objection except on these 15 cars? A. I do.

Q. And as to the other cars, how were the stones on them? A. Well, this happened two or three years ago and I have (533) to refer to my memorandum, but I found that the balance, about 150 cars, the invoices were returned to Mr. Green's office and the remarks that I would make on my memorandum would be fair or good, good load. The next time I might write "nothing wrong with the stone" and I might consult Mr. Graham and ask him about them and if he failed to point anything wrong about the stone I would possibly invoice them as being a good load. I found that that ran right through from about the first, from the beginning of the contract, until the end of the receiving of the stone.

Q. What period of the time when Mr. Graham was working did these overweight stones come in? A. In the earlier part

of the contract. These stones would all come, I think, in the first twenty or twenty-five cars. They would bring all the stones that I criticized.

Q. (The COURT) You mean of the first 25 cars delivered? A. Yes, sir: the overweight stones I criticized would come in the first 20 or 25 cars from the quarry.

Q. (Mr. McLANAHAN) You mean by that, that these 15 cars were among the first 25 car loads? A. Yes, sir: I mean that.

Q. And you testified that on all these cars there were good individual stones, that is there were some defective stones and there were good stones also? A. Yes, sir; good and bad.

Q. From your experience as an inspector, is it or not usual to find some overweight stones in the course of a contract? A. It is. It cannot be otherwise.

(531) Q. Was the amount of overweight stone received in Mr. Graham's yard in excess of the usual amount to be expected in a contract of this size and character? A. It might have been a little larger in these individual stones than we might expect.

Q. But I am asking about the whole thing. A. Well, I think the contract as a whole would come well down below the average by taking our headers and cutting out the back of them as they did at the quarry, which brought them down so I think the average was well under the weight which the stones should be. They took stones like this (indicating) and cut the back out, you know, and then cubed them.

Mr. GAITHER: He should identify the stones which he is referring to. I object unless he states the stones he is referring to.

Q. (Mr. McLANAHAN) Will you just tell the name and number of that stone (indicating)? A. C-29.

Q. Tell the other stones which you referred to? A. I did not point to any particular stone, but I said just stones like that.

Q. That is No. C-29? A. Yes, sir.

The COURT: Gentlemen of the jury, we will take a recess now.

By Mr. McLANAHAN:

Q. At the time you went to Mr. Graham's yard in February of 1907, what force did he have there at the yard? A.

Colby.) A. He had a very small force there but perhaps he had only one car load to work on, and he may have had not more than three or four or five men and some two laborers, and perhaps an engineer was there also.

Q. Had the first car load actually gotten there when you first arrived? A. The first car load was there before me.

Q. Had Mr. Graham any other work on hand at that time? A. Not that I remember about at that time, particularly. There was no work, I think—at least, he wasn't working but he may have had work.

Q. You say there were when you first got it, he had five or six stone cutters, probably an engineer, and two laborers? A. Yes.

Q. How long did he continue to have that force of men in the yard? A. I do not know there very long at that particular time; my work on Hilford was not quite finished and I went back there and left Mr. Graham's yard. When I came back perhaps two or three weeks later, the stone was finished, the Museum contract was about finished. Perhaps a stone or two might have been lying around but I think it was all finished with that exception.

Q. What force did he have then? A. He didn't have any, I do not think.

Q. He didn't have any men working there at all? A. I do not think he did.

(536) Q. How was the yard, open? A. Well, it is always open.

Q. Was he doing any work on any other contract then? A. I do not think he was.

Q. Just tell us when it was that he started things up again, that is when he took on more men and began to do some work? A. It was when he received the next car load of stone.

Q. That was in May, was it not? A. I think so.

Q. Then, how many men did he take on and just what men did he take on, if you can state? What character of workmen did he take on? A. He employed a few good stone cutters.

Q. About how many? A. He may have had eight or ten for all I know. I was not particularly interested in that phase of it, you know, because the stone was not arriving very fast at that time and it looked as he might have had enough to do at that particular time to cut what stone he had.

Q. He took on eight or ten stonecutters when the next shipment arrived on this contract? A. About that, I expect.

Q. Did he take on any other workmen about that time? A. Not about that time.

Q. What further workmen did he take on after that time? A. Well, along about, perhaps, July or August, I think he took on some other work if I remember right.

Q. I mean other workmen. A. As the cars arrived he would drop on a few men occasionally.

(537) Q. He would increase his force at the yard, his force of workmen, as the cars of stone arrived? A. Yes.

Q. Do you know how much wages he paid the stone cutters? A. He paid them $3.60 per day for a day of eight hours.

Q. What kind of stone cutters were they, the men that cut stone by hand or were they the men that cut stone by machinery? A. They were the men that cut stone by hand.

Q. Did he have any men that cut stone by machinery? A. Yes.

Q. What did he pay them? A. I think that their wages was a little more. It may have been $4.00 or four dollars and a few cents or something like that.

Q. How many men did Mr. Graham have working for him about during July and August, 1907, at any one time? A. I think along about that time he would have the force run up to about July and August to about two or five or thirty men or something like that. He may have had two or five or thirty men.

Q. During July and August? A. Yes, that is, stone cutters possibly. Maybe he had that but I did not keep that at all.

Q. What was the largest number of stone cutters, if you can tell us approximately, that he had during the whole time that he was working on this contract? A. As near as I can (538) remember he had, I think, about seventy or seventy-five stone cutters in the fall of 1907.

Q. 1907? A. Yes.

Q. He had seventy or seventy-five? A. Yes, sir.

Q. For how long a period did he have seventy or seventy-five men, if you can tell us? A. A month or two perhaps.

Q. What was the average number that he had, if you can tell us, from say the first of August, 1907, up until the time that he quit work in March, 1908, on this contract? A. Well, I think about fifty would be very near the average from August until March.

Q. Was Mr. Graham doing any other work at the yard during any part of this time? A. He was.

Q. What was that work? A. A part of it was work for Annapolis.

Q. For what down at Annapolis, if you know? A. It seems to me it was some building down there.

Q. Do you know any other part of the work that he had a contract for during that time? A. I think he had a contract for Minotti & Company, for stone that went to Washington, D. C.

Q. Was he working on these contracts at that time? A. He was.

Q. During what time was he at work on these contracts? A. From about perhaps July or August, 1907, to March, 1908. (539) Q. During that time what portion of his men did he use on the Graham work? A. I think that about $\frac{2}{3}$ of them would be on the Graham work and $\frac{1}{3}$ of them would be on the other work.

Q. You mean that $\frac{2}{3}$ of the 70 or 75 men you have testified to that he had in certain months, and $\frac{2}{3}$ of the 50 when you spoke of the general average from July, 1907, to March, 1908, a being about 50, would be on the Graham work and $\frac{1}{3}$ would be on the other work? A. I think so.

Q. In March, 1908, about the 6th or 7th of March, how many men did Mr. Graham have at work in his yard all together, if you know, stone cutters? A. I do not know. I know that the force was reduced considerably by that time. In that week there were considerable men laid off.

Q. Why were they laid off? A. I do not know.

Q. Was there stone there to work on? A. Oh, yes, there was plenty of stone.

Q. Plenty of stone? A. Yes.

Q. How was the weather? A. Well, the weather was fairly good, if I remember right.

Q. Did Mr. Graham have any shelter or sheds in his yards for men to work under? A. He had some.

Q. Were there enough sheds for all the men to work in? (540) A. Oh, yes; yes, I think he did.

Q. Were the men protected from the weather there in the sheds? A. They had the roof over their heads.

Q. What is the wage of a stone cutter if he works in the open?

Mr. Gaither: In Baltimore, Mr. Pirie.

The Witness: I am not acquainted with the Baltimore schedule of wages. I do not know them. It is the bill the stone cutters make and I have not been in Baltimore for some little time and I do not know the bill.

Mr. McLanahan: State how it is in Washington. A. In Washington it is $3.60 for under cover work and $4.00 when they are working out doors in the sun.

Q. I hand you this schedule, which is already in evidence, and will you state whether or not after June 1st, 1907, up until March, 1908, Mr. Graham cut, in any month, as much stone as the Government sent him from the quarry in Vermont? A. No, he did not.

Q. Will you just tell us how he fell behind on that work? A. I find here at the end of the month of July he had received 5,937 feet and 8″ and he had shipped on the same date 4,025 feet 11″. A little further down here in September I find that he received 10,985 feet and 11″, and on that date he shipped 8,148 feet and 10″. A little further down at the end of October he had received 16,977 feet and 7″ and he had shipped to Washington 11,619 ft. 7″. A little further down at the end of December, 1907, he had received 31,517 ft. and ½″ and he (541) had shipped to Washington 20,356 ft., and on March 5th or 6th when he stopped work he had received 40,870 ft. ½″ and he had shipped to Washington 28,932 ft. 4½″.

Q. And how much rough stone was there in the yard when he quit work? A. Well, then, on June 12th, there were thirteen more stones shipped amounting to 99 ft. 6″, making a total of 29,031 feet and 10½″ cut all together, leaving 11,838 ft. 2″ in the yard.

Q. Can you tell us, Mr. Pirie, what the total amount measured at quarry cube measurement, the total amount of stone measured at quarry cube measurement, was used in this contract of Mr. Graham all together, both the amount cut by Mr. Graham here and the amount cut by the Government in Washington?

Mr. HARLEY: Do you mean with the extras or just as the contract?

Mr. MCLANAHAN: Just as the contract stood, and then the amount of this extra at quarry cube measurement. Have you any memorandum that shows that?

(The memorandum was produced by the witness.)

(It is hereby agreed that said original memorandum may be used in any court at the hearing or in argument in this case.)

Q. When was this memorandum made, Mr. Pirie? A. Sometime after the work was finished; I do not just exactly remember when.

Q. Where did you get those figures from? A. I got those figures from those schedules which, of course, was made when Mr. Graham stopped work, and the balance was got from the schedules after the work was finished at the building. I believe (542) I have got the figures here.

Q. Are those schedules on the work that you furnished at the building shown in that book too? A. They are shown in that book, yes. That is, this shows how much cut stone I reported at the building monthly until the work was done, I think.

Q. Are those schedules as shown in the book here summaries made up from the reports of the stone in the first part of the book? A. They are.

(Objected to.)

Mr. McLANAHAN: If your Honor please, this book is in evidence and I will ask him what these schedules are, and ask him if this is a summary of those schedules to save time. If my brothers want to take this schedule and cross examine him on it to find out whether those totals are wrong they have a perfect right to do so. They are taken from the original entries which are in evidence.

(It is hereby agreed that said book and schedules may be used in any court at the hearing or in argument in this case.)

Mr. GAITHER: We will not object if the original entries are in evidence.

Q. (Mr. McLANAHAN) These are the original entries (indicating)? A. Yes.

Q. Of the schedules? A. Yes.

Q. Is that memorandum there made up from this as to (543) the stone cut in Washington, made up from the original entries on this book? A. The memorandums are both made from the entries or schedules on this book.

Q. And these entries and schedules are made how? How did you make them up? A. These entries are made up by my sending to Mr. Green on December 15th No. 42 schedule with 24 stones on it cutting up 1,115 feet 5". Then again on the 31st of December I sent 43 stones—

Q. Mr. Pirie, are these schedules made up directly from the report made in the first part of this book on each stone, or are they made up from the schedules which you sent in to Mr. Green? A. This is the 48 schedule. When I had cut stone enough to fill one of these sheets I would put them in a schedule and forward them to Mr. Green's office to show that we had cut and finished that much stone. Then I would take these figures and put them on the book.

Q. Where did you get the figures that go on this schedule from? A. From the plans.

Q. From the plans—which plans? A. These plans (indicating).

NOTE: Said plans have hereinbefore been inserted.

Q. How would you tell when those stones were cut on those plans? A. Well, the stones when finished, in the cut-

ting shed there would be a cutter's diagram and we would see (544) by the cutter's diagram the maps that was on the stone, the location and the number of the stone would be there too, and we would look it over for that and we would come here and enter the stone up as being cut. Then, when I had 15 or 20 or 25, more or less, of these diagrams of finished stones I would make this up from that.

Q. Would you look at the finished stone and see that the diagram corresponded with the stone? A. Yes, I would do that.

Q. Did you know personally that those stones were finished, that the cutting on those stones were finished? A. I did; I knew they were finished before I made this schedule.

Q. Do you know personally that they were finished? A. I am sure of it.

Q. Will you look over these papers and say whether or not they are the originals of your reports of cut stone made to Mr. Green after you took charge in Washington?

Mr. HARLEY: They are to come in as the other paper, subject to exception, if your Honor please.

The COURT: Yes.

Q. These are the schedules made up by you on the personal knowledge that the stone was cut? A. Yes.

Q. Look over these and say whether or not they are the schedules, the originals made up and sent into Mr. Green as you finished cutting the stone at the building in Washington. (545) You had better look at them to make sure of that. A. These are the schedules. There is the 45 schedule signed by me.

(It is hereby agreed that said reports and schedules may be used in any court at the hearing or in argument in this case.)

Q. Does your name appear on all these schedules? A. It does. This is a summary for the month of December that shows what we had cut up to the end of December.

Q. What year? A. 1908.

Q. Look through them—you needn't take every one, but just see, Mr. Pirie, if they are all your reports that you sent in showing the cutting of this stone and if you knew this stone was cut before you made them, kindly state that fact? A. They are all mine. I knew the stone was cut before I made them.

Q. Look all through them just one after the other. A. All right. This is a monthly statement. That would be a monthly statement for the end of November; that would be a

summary for the month of November showing what was done up to that time.

Q. Just look through them and make sure they are your reports. A. I am pretty sure they are my reports; I am satisfied they are my reports.

Q. You are satisfied they are your reports? A. Yes. I am satisfied they are my reports. They are made out by me (546) and turned in to the Master Mechanic, who, of course, always signed for them. The stone had been turned over to him and signs as—

Q. Mr. Pirie, are these measurements taken on quarry cube measurements, the ones that appar here? A. All taken on quarry cube.

Q. All on quarry cube? A. Yes.

Mr. McLanahan: If your Honor please, we offer this in evidence subject to exception.

Q. Mr. Pirie, will you look at your book and show what schedules you made up from those schedules. Those are the schedules that appear in the back of the book. A. Those are the lists of the schedules that I turned in that would be found in the month of June. This is the schedule I turned in in July and a summary of this would show how much we cut in July.

Q. Those entries are copies of all the original reports which you made to Mr. Green, are they not? A. They are copies.

Q. Have you totaled them up and if so, state what that total comes to, showing the number of cubic feet cut by you during the time you were on that work in Washington at quarry cube. Read the total for each month. A. The end of the month of May—

Mr. Gaither: 1908?

The Witness: Yes.

A. (Mr. McLanahan) Will you please just answer my (547) question. Read the total for each month from the time you took charge of the work in Washington, on Mr. Graham's contract down to the time you finished it showing the total number of cubic feet cut by you, giving your measurement at quarry cube? A. At the end of May, 1908, we had cut 848 feet 3½"; month of June we cut 4,106 ft. and ½"; in the month of July we cut 6,114 ft. 6"; in the month of August we cut 7,149 ft. 3", making a total for those four months of 18,212 ft. 7½". And then in September we cut 6,016 feet 5½" and October we cut 3,297 ft. 1" and in November we cut 921 ft.

8″, and in December we cut 1,760 ft. 3″; in January we cut 3,702′ 5″; in February we cut 2,316′ 8″.

Q. That is February of 1909? A. That is February, 1909. In March, 1909, we cut 1,770′ 3½″.

Q. That is when you finished up the contract? A. Yes, making a total of 38,511′ 5½″ cut at the building.

Q. Quarry cube? A. Yes.

Q. Is this one of the reports which I now hand you? A. That is a summary.

Q. What does that show? A. Shall I read it?

Q. Just tell us what it is first. A. It shows the total cubic feet cut by Mr. Graham, quarry dimensions—it shows the total cubic feet cut at the building at quarry dimensions and the total stock on contract.

(548) Q. Will you read that to the jury? A. Granite cut during February and March 4,600 ft. 8½″, previously reported 33,910′ 9″, total cut at the building was 38,511′ 5½″, cut by Mr. Graham 29,071′ 10½″, total stock on contract as per cutting schedules, quarry cube 67,543′ and 4″.

Q. Now, Mr. Piric, you have testified that these are the measurements, quarry cube measurements? A. Yes.

Q. The total that you have just testified to includes the extra stone which has been mentioned in evidence in this case, does it not? A. It does.

Q. How many cubic feet by quarry dimensions were in that extra stone? A. You mean in addition to the dome?

Q. Yes, the dome, and the deepening of the cornice stones? A. There was about 1,800 feet as near as I can remember. I had the memorandums here but I do not see them in front of me.

Q. That was quarry cube? A. Quarry cube would be a little over 1,800 feet.

Q. This 67,000 includes the 1,800 cubic feet in those extras, does it not? A. Yes.

Q. Now, can you tell us what the dimensions would be if the measurements were taken at net dimension measurements instead of quarry cube. The total, about?

Mr. Gaither: Have you figured that out yourself, Mr. (549) Piric?

The Witness: I haven't figured that out.

Q. (Mr. McLanahan) You do not know that personally? A. I haven't figured that out. I figured parts of it but not the whole of it.

Q. Who had the business of figuring up the net dimension? A. I figured it up about the time that Mr. Graham got the contract.

Q. Before the work had been done? A. Before the work had been begun, but we put in extras you know, a little addition then here and there and I did not figure it up that way.

Mr. GAITHER: You say you figured it up when Mr. Graham got the contract? A. Before the work had been begun.

Q. (Mr. McLANAHAN) You just now *state*, Mr. Pirie, that you figured up the cubic feet stones at net dimension measure before Mr. Graham got the contract? A. I do.

Q. Will you tell us just what you figured up the cubic feet to be? A. A little over 61,000 cubic feet.

Q. Without any extras at all? A. Yes.

Q. Will you look at this invoice, which is already in evidence, and tell us if you can refresh your recollection as to just who figured up the net dimension measurements on all (550) these stone? A. My opinion about it was that it was Mr. Freas, judging from the initials that are here, but I did not see him do it.

Q. Mr. Pirie, you have testified that Mr. Graham did not cut, in any month the amount, the equivalent amount of stone to that which he received from the quarry? A. He did not.

Q. Did you ever make any reference to his failure to keep up to the amount that he was receiving? Did you ever make any complaint about his not cutting enough? A. I have called his attention to it occasionally about the months, along in the fall and winter of 1908 and 1909.

Q. About when did you begin to make these complaints, if you can say? A. Well, along about—I do not know that I could just call them complaints but I would talk the matter over with Mr. Graham as he was piling up stone, you know, about along in the fall.

Q. The fall of what year? A. 1908.

Q. 1908? A. 1908.

Q. He quit in 1908, didn't he? A. Yes.

Q. You mean 1907, don't you? A. No, he began to receive stone in 1907 and he worked along all through 1907 and the fall of 1907 and a few months in 1908. It was about September or October, and perhaps November of 1907, along about that, in the fall of 1907.

Q. What did you say to him in those complaints if you (551) recollect it? A. I would remark that he should take up the column drums and cut them and get them out of his way instead of having the yard piled up with them.

Q. And what about the force that he was employing at that time? Did you ever say anything to him about that at all? A. About what?

Q. About the number of men he had at work? A. Yes.

Q. What did you say? A. We would perhaps talk that over.

Q. Did Mr. Graham's yard become at all filled with stone, crowded up with stone? A. Yes, it become crowded.

Q. When did it become crowded? A. Well, it was crowding up from about—it began crowding about in November, 1907, until March, 1908, when the—

Q. Was it a gradual process or was it one big mass of stone dumped on it at one time? A. It was gradually filling up.

Q. Did he have any room around there that he could have given?

Mr. Garrigus: Do not lead him any further, Mr. McLanahan.

Q. How about the ground around outside of his yard, was that built up or was that vacant? A. It was vacant.

Q. Did you ever have any conversation with him in re- (553) gard to extending his yards? A. Yes, I talked with him about that and I believe he was to do that.

Q. Did he ever do that? A. He did not to my knowledge.

Q. Did you ever ask him to do that? A. I do not know that I asked him but I told him I did not see how he could get along unless he did it.

Q. Mr. Piric, you said his yard was gradually piling up with stone? A. Yes.

Q. What kind of stone was it piling up with? A. It was piling up with the largest stones and the ones that had the most work on them.

Q. Will you state just what character of stone Mr. Graham cut? A. He cut the plain ashlar; he preferred to cut that.

Q. How about the expense of cutting plain ashlar, was that cheap stone or expensive stone to cut? A. Ashlar was the cheapest stone on the job to cut.

Q. How much does ashlar cost, at the rate of wages for cutters that Mr. Graham was paying, to cut per cubic foot, if you know? A. I will say about one dollar per cubic foot.

Q. To cut the ashlar? A. Yes. It depends upon the man.

Q. What was that? A. It would depend entirely upon the man that was put on it.

Q. How much would you say it would cost to cut a column (553) drum, for instance? A. Well, four to five dollars a foot, and it would be according to the man that was on it.

Q. The column drums called for in this contract were to be made into what shape? A. Perfectly round.

Q. Were they fluted? A. Yes.

Q. What do you mean by fluting? A. These are fluted columns that we see over the way (indicating the Court House). The drawings I think will show the flute.

Q. Now, Mr. Price, it has been testified here by Mr. Green that Mr. Graham had cut some of those modillions. Are those expensive stones to cut? A. Well, yes, they are quite expensive.

Q. How many modillions were there altogether on this job? A. I think there is about thirty-five. We have doubled one at the corner, that you might count as two, and by doing that I think you would get about thirty-five.

Q. How many modillions did Mr. Graham cut, if you know? A. About 22 or 23, I think.

Q. And how many were cut over at Washington? A. About 12; that is counting the corner ones as two, counting the double one in the corner as two, I think we cut 12.

Q. Did Mr. Graham have all of those modillions in his (554) yard before he quit work? A. I think he did. This book would just show how many he had and how many he didn't have. I think they were all there.

Q. Can you tell us definitely. Have you made any memorandum from that book showing it? A. I do not think I had a memorandum of how many he had in his yard. There appears to be a few of them stones received at the building after Mr. Graham stopped work, probably four or five or six or something like that.

Q. Five or six of them were received by you at the building? A. I think so.

Q. Count them up. Take time and count them up and let us know how many there are. A. I find four, perhaps.

Q. Now, were all the stones in this course modillions, the course that you have just been looking at? A. No, sir, there were some little small pieces that went between the modillions.

Q. Does that stone represent a modillion (indicating)? A. I do not think that it does.

Q. To make sure, this stone I am pointing at is 6 X, is that a modillion? A. It is not the dimensions of a modillion. There are other stones that belongs to the course running out there and I think that would be one of them stones back in here (indicating). It has not the dimensions of a modillion.

(555) Q. And that is one of the stones that you counted in the four just now as being the four that you received over there? A. It is.

Q. That would make three modillions? A. Yes.

Q. Will you look at this stone here 28 X. Will you say that that is a modillion or not? A. That is a modillion, I am sure of that.

Q. And that is one in the four you are talking about? A. Yes.

Q. Look at 31 X? A. That is a modillion.

Q. That is two out of the four? A. Yes.

Q. Look at this stone over here, mentioned as 60 X. A. That is a modillion.

Q. Three of them were modillions? A. Yes.

Q. As I understand you, now, there were 35 modillions as a total and Mr. Graham had in his yard at the time he quit the contract all but three of those modillions? A. Yes.

Q. So that Mr. Graham would have had in his yard 32 modillions? A. Yes.

Q. And you testified that he cut 23 out of these 32? A. Yes.

(556) Q. And the Government cut the balance, 12? A. Yes.

Q. And nine were shipped from the yard here and the other three came direct of those 12? A. Yes.

Q. Tell us what the total cubic feet is in all these 35 modillions? A. Take them as eight feet apiece. I see I have got them put there at 7' 10".

Q. Have you a memorandum of these different things?

(Witness produces memorandum.)

(It is hereby agreed that the original memorandum here referred to may be used in any court at the hearing or in argument in this case.)

A. Yes.

Q. Mr. Pirie, did you make up this memorandum yourself? A. I did make this memorandum up myself.

Q. What did you make it up from? A. I made it up from the plans, I think—this book.

Q. Is all that figuring, and is all that writing on there your own? A. Yes.

Q. Will you tell us, refreshing your recollection from that memorandum, what is the total cubic feet in all the 35 modillions? A. About 196 cubic feet.

Q. How much, now, there were 35 of them? A. I am wrong there.

Q. Didn't you figure this up last night? A. I did.

Q. Then what is the total? A. About 280.

Q. 280 is the total? A. Yes.

(557) Q. What is the total cubic feet that were cut by Mr. Graham? A. About 184.

Q. What was the total cubic feet cut by the United States Government? A. About 96 cubic feet.

Q. Now, what are the moulded column bases, are they plain stone or stone hard to cut? A. They are about the most expensive, or the most expensive cut stone on the job. That is so far as cutting stone is concerned, they are not carved but there are some stones that are carved.

Q. What is the total cubic feet in all the moulded column bases? A. There are about 379 feet 4" or something like that.

Q. And how many cubic feet were cut by Mr. Graham on these moulded column bases? A. Not any.

Q. How many were cut by us? A. 379' 4".

Q. Take now the columns. How many columns were there A. Eight columns altogether.

Q. Was that plain work or hard [illegible]? A. Plain cut columns with mouldings on top and bottoms of the columns.

(558) Q. There were eight of these columns? A. Yes.

Q. How was each column divided up? A. Into six drums.

Q. What is the total cubic feet in all these eight columns? A. The total cubic feet in the eight columns, not including the bases or the caps, would be 5,424.

Q. Did Mr. Graham cut any of them? A. He did not.

Q. Who did the cutting of them? A. They were cut at the building.

Q. How do you know they were cut at the building? A. I seen them being cut and they were afterwards setting them up, putting the cap or top on them and it was pretty good proof that they were cut.

Q. They are all up there? A. I think they are.

Q. Take the pilasters, are they plain or hard stones to cut? A. They are not the very best. The front of them is fluted.

Q. How many pilasters were there? A. There was six pilasters.

Q. How were they divided up, into drums or how? A. They were divided into stones about 2' high and 3' 11" long.

Q. What is the total cubic feet in a pilaster? A. Well, about 8, I think, the average would be 8.

(559) Q. In each stone? A. Yes.

Q. What is the total cubic feet in the whole six pilasters? A. About 864; about eight or nine hundred.

Q. How much did Mr. Graham cut of them? A. He cut them all.

Q. All of them? A. Yes.

Q. Take the W 1 course. Where does the W 1 course run. Take this picture right here and maybe you can show it

later to the jury. A. The W 4 is this course right over here (indicating) that runs underneath. There is the ceiling underneath and it is cut underneath as well as on the front, cut and carved.

Q. That is a little over the portico? A. Yes.

Q. Will you tell us what is the total cubic feet in those little stones over the portico? A. The cubic feet in the W 4?

Q. Yes. A. Cut and carved for the building there were ten amounting to 689 feet.

Q. That was cut at the building? A. Yes, cut by Mr. Graham three stones, 66'.

Q. The total is how much? A. The total is 755 feet.

(560) Q. And of them Mr. Graham cut 66'? A. Yes.

Q. Take the ceiling of portico? A. Yes.

Q. That is the ceiling up underneath there (indicating)? A. Yes.

Q. What is the total cubic feet in that? A. The total cubic feet in that is 2,397' 8".

Q. Did Mr. Graham cut any of that? A. He did not.

Q. How many stones are in that ceiling? A. There were 62.

Q. Take the W 4 course and show us where that is on this picture. A. W 4 course is this course up here (indicating). Under the modillions there is a block and space.

Q. Those dentils here (indicating)? A. Yes, this course right here.

Q. Just underneath the modillions? A. Yes, there is moulding and carving right under here (indicating). It is right over here and you can see it very plain. This is W 4.

Q. Was that an easy course to cut or was it a hard course to cut? A. It was not, no.

Q. What is the total cubic feet in that course? A. Well, there is about a little over 1,000 feet in that.

(561) Q. The W 4 course? A. Wait a minute; wait a minute.

Q. How much was cut by Mr. Graham on that W 4 course? A. Mr. Graham cut three stones amounting to 59' 7".

Q. And how much stone was cut by the Government on that course at the building? A. About 26 stone, 592' 9".

Q. That makes up the total of the stones cut on that course? A. Yes.

Q. Take the Z 9 course, where is that? Point it out right here (indicating). That is the fret work. A. Z 9 is right along here (indicating), right around here and all around the back of it; it goes all around.

Q. Will you state what is the total cubic feet of the Z 9 course that was cut by Mr. Graham? A. The cubic feet

of stone which the feet is cut in is about 1,455' 2", but there are several plain stones in that with no feets in them.

Q. How many were cut by Mr. Graham? A. Mr. Graham cut 955' 7".

Q. How many did you cut? A. We cut at the building 499' 7".

Q. Do you know whether or not he had this other 499' 7" of stone in his yard when he quit the work? A. I think he did, yes, sir.

Q. Take the Z 18, the raking dentils, and show us where they are? A. That course is right in here. It goes up along (562) there (indicating).

Q. Did Mr. Graham cut any of those stones on that course? A. He did not.

Q. Now, go up on the drum, the D I course, did Mr. Graham cut any of those stone? A. I think he did.

Q. How many did he cut? A. He cut about 38 out of 96.

Q. D I course is where on that dome? A. That is the D I course running right around there (indicating).

Q. Now, the D J, course, point that out to us. A. That is the course right there, the dentil course.

Q. The dentil course right above the D I course? A. Yes.

Q. Did Mr. Graham cut any of those stones? A. He did not cut any of them stones.

Q. How about the D K course, show us that. A. That is right in here.

Q. Did Mr. Graham cut any of those stones? A. I think that Mr. Graham cut about eight or something like that.

Q. Out of how many, the total in the course? A. There would be 48 stones in the course.

Q. Now, in the dimensions of the stone which you have given us, and you speak of the cubic feet, your measurements are all quarry cube, are they not? A. All of quarry cube.

(563) Q. Is there any other work on this part C, which was in Mr. Graham's contract, that is expensive work to cut, I mean more expensive than the plain ashlar? A. Oh, yes.

Q. Will you show us just what part there is? A. This is plain ashlar (indicating) and that is plain (indicating) and that is plain. The costly stones are these moulded column bases—

Q. Pick out any other stones than the ones you have testified to that were more expensive than the ashlar to cut. A. All these stones here (indicating).

Q. They are the ones you just testified to? A. They are costly stones to cut.

Q. Who cut those stones (indicating)? A. We cut them.
Q. Did Mr. Graham cut any of them? A. No, sir.
Q. Who cut that around the door? A. Mr. Graham cut that around the door.
Q. Who did the carving around the door? A. The carving around the door was done by the Government.
Q. That was supposed to be done by the Government, was it not? A. Yes.
Q. Mr. Graham was just to rough that out? A. Yes.

The Court: It wasn't in his contract?

Mr. McLanahan: No.

(564) Q. Is there any part on this building which is more expensive to cut, I mean on this part C, than the parts which we have just been talking about? A. Not any that I know of.
Q. Not any that you know of? A. No, sir.

Mr. McLanahan: We will offer this in evidence.

(Memorandum referred to is in two sheets, the first sheet being marked in the right hand corner No. 1 and the second sheet being marked in the right hand corner No. 2.)

(It is hereby agreed that the memorandum here referred to may be used in any court at the hearing or in argument in this case.)

Q. You have seen the setting plans offered in evidence in this case, have you not? A. Yes.
Q. Did you ever have anything to say to Mr. Graham, or his draftsman, about the setting plans? A. Yes.
Q. What did you say? A. Yes, I used to frequently call on them to see about getting them down to Washington and pushing them along.
Q. Why were you pushing them along? A. Because I understood through Mr. Green that they needed sizes at the quarry.
Q. Could they get the size at the quarry before they had (565) the setting plans? A. Not very well.
Q. Did you ever hear of them taking out sizes at the quarry before they had the setting plans? A. Oh, yes, it has been done. On one occasion here when the plans were behind we made a list of some stones that were alike and sent them to the quarry without the sizes.
Q. How many were in that list? A. About 90.

Q. Ninety out of the whole lot on this job you did in that way? A. Yes.

Q. What kind of stones were they? A. They were these stones here (indicating).

Q. Were those stones all the same? A. All the same, exactly.

Q. All of them alike? A. Exactly alike.

Q. Why was it you sent up that schedule for those stones ahead of the setting plans? A. Because the quarry was short of sizes to work from.

Q. They did not have any setting plans, in other words? A. Well, they had setting plans up there, you know, but they needed a little variety to make the things go right—a variety of sizes, different sizes.

Q. Why did they need different sizes up there? A. Because if any particular ledge they were working on was not big enough to get some of the large stones out of they could get some small ones, and if they had a variety, if they couldn't get (5611) one stone they could get another.

Q. Is that usual in quarrying stone? A. It is usual to try and have a variety of sizes, if possible. Sometimes it cannot be got, but there was a variety of sizes on this particular job.

Q. Mr. Pirie, will you look at the letter which I now hand you and refresh your recollection as to any conversation you may have had with Mr. Graham on or about October 5, 1907, in regard to setting plans, and if it does so refresh your recollection, please testify as to what that conversation was. Do not read the letter but just testify what your recollection is about that conversation and testify to what you told Mr. Graham and what he told you and what was done? A. I went to see Mr. Graham about setting plans and he instructed—

Mr. HARLEY: That refreshes his recollection.

Mr. MCLANAHAN: It seems to.

The WITNESS: And Mr. Graham informed me.

Mr. MCLANAHAN: Do not read the letter but tell us the substance of it, what you recall about it.

Mr. GAITHER: Read the letter through and then testify.

A. I called at Mr. Graham's about drawings and he informed me that the drawing was going to be all got out in a week, and that he had instructed his draftsman to write to

Mr. Green to that effect—I mean in two weeks they were to be all got out and he had instructed his draftsman to write to Mr. Green to that effect.

Q. About when was this that you had this conversation (567) with Mr. Graham? A. About October 6th, 1907.

Q. What year? A. 1907.

Q. Were those setting plans gotten out within two weeks? A. No, sir; they were not gotten out within two weeks.

Q. Did you keep talking to him about getting them out? A. I think I did.

Q. Do you remember any other conversations you had with him, complaints that you made to him, about getting out setting plans? A. Yes, a little bit further along I think I talked to him about them and—

Q. Why was it you were so insistent on getting these setting plans? A. Because Mr. Green was writing me, and urging me, when I called on him at the building, urging me to do what I could, you know, with Mr. Graham to get out the plans.

Q. You have testified, Mr. Piric, that Mr. Graham stopped work on this stone sometime early in March. Will you tell just what day of the week it was that he stopped? A. Saturday.

Q. Can you tell us the circumstances, as you recollect them about that stopping of work, what you know about it personally? A. I did not just happen to be there as I had to go down to the building on that particular Saturday on some business in (568) connection with a stone.

Q. You had to go to Washington? A. Yes, in connection with a stone; there was something wrong with it and the men had stopped to take dinner when I left.

Q. They had stopped at Graham's yard to take dinner when you left to go to Washington? A. Yes, and I believe they never went to work again.

Q. When did you discover that Mr. Graham had stopped work, if you so discovered it? A. I discovered it Monday morning when I got back from Washington and found the place quiet.

Q. Was there any work going on there in the yard then? A. No, sir.

Q. Were there any men working there? A. Oh, no.

Q. Was there any stone there to be cut? A. Yes, there was plenty of stone around there to be cut.

Q. Plenty of stone but no men? A. That is it.

Q. Who did you notify when you found this condition to exist, if you notified anyone? A. I telegraphed to Mr. Green.

Q. What did you tell Mr. Green? A. I told him that Mr. Graham had stopped work and paid off his men.

Q. You told him that Mr Graham had stopped work and paid off his men? A. I think so.

Q. Did you get any instructions from Mr. Green? A. (569) Not for some little time, I do not think.

Q. What did you do then, right away? A. Well, I staid on the works; I staid in the office some little time.

Q. For how long a time were you in the office there at Mr. Graham's yards? A. Well, I was around there perhaps a week or ten days, or something like that, if I remember right.

Q. Was there any work done at all in the yard during that time? A. They went to work on some other work in a few days after that, I think.

Q. Did they do any work at all on the completion of this contract? A. Oh, no, no.

Q. Was there ever any more work done by Mr. Graham on the completion of this contract? A. Not any, no sir.

Q. What became of the rough stone in the yard which had been brought down to Mr. Graham from Bethel, intended for this South Pavilion? A. We made contracts to have it loaded on cars and shipped to Washington.

Q. Who had charge of the making of those contracts? A. Well, they were made by Mr. Green.

Q. Made by Mr. Green? A. Yes.

Q. Did you have anything to do with making those ship- (570) ments to Washington? A. Yes, I had something to do with it. I believe the first load I had taken out of the yard.

Q. Were you there when it was taken out? A. I was there when it was taken out and saw it put in a wagon and hauled to the B. & O. station and loaded on a car there. That was the first load.

Q. Was there a track from the B. & O. into Mr. Graham's yard? A. Yes.

Q. Why couldn't you take the car right in there and get it loaded up? A. Well, we hadn't just at that time made the contract to load the whole amount. We were taking a carload of the stone which was needed at the building quickly and we thought we could get them to the building quicker that way than to wait and make the contract and ship the whole amount.

Q. Did Mr. Graham give you this stone freely and willingly when you came after it? A. Yes, I believe he did.

Q. You believe he did? A. Mr. Graham was'n't about. This stone had been replevined, as I understood it, and there was a watchman put in charge of it by the Government and Mr. Graham was'n't there to make any objection.

Q. So the stone was in charge of a watchman of the Government when you took it out of there, when you actually took (571) it out of the yard? A. Yes.

Q. Before this watchman of the Government took charge of that yard, or was down there in the yard, did you try to get any of the stone out? A. I was down there with the foreman of the Baltimore & Ohio Railroad looking the ground over to see how we were going to get it out and about getting the wrecking car in there and getting the price set on loading it on cars with the B. & O. wrecking train.

Q. Were there any obstacles placed in your way about getting it out at that time? A. I found on the following morning that the track had been torn up and the boom of the derrick lowered on the track, and weighted down so that to make sure no stone would get out that way.

Q. Was there any stone cut on March 7th, 1908, when you left for Washington? A. There was a few stones cut.

Q. In the yard? A. There was, at least, thirteen stones that I showed you in the book here that had been cut that morning.

Q. Were all those 13 stones in the same condition when you were going around there with the B. & O. foreman and found this derrick lowered down as they were when you saw them on March 7th? A. No, when I saw them on March 7th they were all right. Later on, one of the best stones in the (572) lot appeared to be broken.

Q. When you saw them later there was one that was broken? A. Yes.

Q. Could you tell how it was broken? A. No, I could not tell you that.

Q. Can you give an opinion as to how it was broken from your knowledge of stone? A. It was said to be broken in the night.

Q. You only know what was said to you about that but you do not know that personally? A. I do not know personally. I did not stay there at nights.

Q. After this Government watchman took charge you had no difficulty in getting the stone out as you wanted it? A. O, no, there was no difficulty that we had then.

Q. Who had charge of getting that stone out and getting it over to Washington? A. The contract was given to a man by the name of Carlson, I believe.

Q. Carlson? A. Yes. He got it out with the help of the B. & O. crane. I was about there to show them the stones that belonged to the contract, and to show them some stones that were cut and that had to be boxed to keep them from getting damaged in transportation. They were partially cut. Final-

ly, when the stones were all loaded on the cars, I went over to see that we had gotten all the stones that belonged to the Government.

Q. Did Carlson do this work of loading the stone, if you (573) know? A. He did.

Q. He loaded up all that stone, did he? A. He did.

Q. After you got all that stone over there to Washington, who had charge of this stone cutting in Washington in completing this work? A. I had charge of that under Mr. Green.

Q. What was your official position? A. I was known as Master stone cutter.

Q. What organization did you have under you for doing this work? A. I had three foremen most of the time, and there was a blacksmith shop you know, and a foreman blacksmith who had some eight or nine men under him.

Q. Were you and the three foremen and the blacksmith, and the rest of the men you testify about, working on other work for the Government in connection with the Museum, or were you working only on this Graham work for the South pavilion? A. The men under me was working on the Graham work.

Q. They were working on the Graham work only? A. On that only, yes. That is, in the first part of the work, you know, they worked on that, but along toward the end we did a little other work for the Government.

Q. And when that other work was done for the Government, kindly state how the pay of these men was charged. Was it charged all to the Graham work, or how was it charged up if you know? A. We did some work which was charged (574) up to Graham. The men's time was kept and the amount was credited to Mr. Graham.

Q. Suppose some of Mr. Graham's men did some work on the Government work, the other work over there, was the time that those men put on this other work charged to Mr. Graham's account? A. I do not understand you.

Q. I will repeat the question in this way. Suppose some of the men who were under you in Washington did some work on the rest of the building, not included in this part C, and not under the Graham contract, was the time that they put in on the other parts of the building charged to Mr. Graham's account? A. O, no. When they wanted a man on another part of the building they would sometimes come to me and borrow a man and the man's pay went up from $3.60 to $4.00 as soon as I turned him over to them, and he worked for them until they got done with him and then he come back to me again.

Q. His pay would not be charged to Mr. Graham? A. No, sir, that was just done for accommodation.

Q. To what account would that $4.00 per day that you just said he would receive be charged? A. To the Government.

Q. It would not be charged to this Graham account? A. It would not be charged to Mr. Graham. I do not think there was any stone cutter that got $4.00 on Mr. Graham's work over there.

Mr. GAITHER: Will you give us that memorandum of figuring that you made up when Mr. Graham took this contract, (575) if you have it?

A. I think I have it.

Q. Then produce it Monday? A. All right, sir.

Q. (Mr. McLANAHAN) Mr. Pirie, on Friday I asked you about some 90 stones in that arch which you said were put in a schedule and sent to the quarry before the setting plans for those stones were completed. Will you tell us how that schedule was made up and all about it? A. It was made up by Mr. Graham's architect and me, by taking one of the stones and laying it down in his hall and making 90 like it.

Q. How did you do that? A. We laid it full length in the hall and we took the full radius and we cut a pattern from it.

Q. Who was Mr. Graham's architect? A. Mr. Mason.

Q. And he was the man who made up the setting plans? A. He was the man who made up the setting plans.

Q. Was this done on any other part of the building? A. No.

Q. Would it be practicable to do that in any other part of the building? A. I don't think it would be practicable to do that.

Q. Did you ever know of this being done before on a building of this size and character? A. I have not.

Q. It is the only schedule that was made up without the (576) setting plans going in? A. It is the only one.

Q. At the close of your testimony on Friday you had testified that you had several foremen under you at your yard in Washington after you began to do the work in Washington. Now, how many stone cutters did you employ over there? A. The stone cutting corps run from about 100 up to 130 at one time.

Q. From 100 to 130? A. Yes, I think that was the number, 130, for a few days.

Q. What wages did you pay those men a day? A. $3.60 a day to all the stone cutters.

Q. 3.60—was that to the men who cut by hand or machines? A. We did not have any machines there. It was all handwork. We had hand pneumatic tools, but that is different from the regular machine. We had no regular machine.

Q. What is the regular machine like? A. The regular machine is on a stand and it chops down the stone, moves back and forth and chops it down.

Q. What is the handcutting machine? A. It is a small pipe with a handle to it and chisel edges.

Q. Mr. Graham had some of the big machines? A. Oh yes.

Q. And you testified that Mr. Graham paid his machine men about $4.00? A. Perhaps a few cents more. I don't remember. I was not interested in that.

Q. Do you know whether or not any arrangement was made (577) whereby the wages of the men were kept at $3.60, and if so, state what it was, that is, under the Governmental work on this part of the contract, part C? A. I did not have anything to do with that. I have overheard it said—

Q. (Mr. Harley) Do you know about it or is this just what you have heard? A. I don't know about that. I was not interested in that at all.

Q. (Mr. McLanahan) Will you state whether or not you had any conversation with a Mr. J. J. Crowley, in connection with the wages of the men on this part C, do you remember about that?

The Witness: Will you state that again?

Q. Do you remember before you started to work in Washington having any conversation with Mr. J. J. Crowley of the Granite Cutter's International Association of America? A. I talked some to him on the subject.

Q. What was the subject that you talked to him about? A. Well, the subject was that we would get the $3.60 rate if we gave the men temporary cover.

Q. That is what you spoke to him about? A. That is what I spoke to him about.

Q. How long was that to last A. Throughout the job.

Q. Was that $3.60 rate adhered to throughout the job? A. It was adhered to during the work, to the end.

Q. And that was the same rate that Mr. Graham paid his (578) men in Baltimore? A. Yes, sir; the same rate.

Q. Do you know if the union raised its rate on that kind of work in Washington after that? A. It was not raised; they took a half holiday which went into effect this year—

Q. Well, Mr. Pirie, getting at the top of the organization which you have testified to, what were your duties in connection with the finishing of this work in Washington? A. My duties were to receive the stone as it come from the office and check it up with the invoice, and if they were correct, to sign the invoice and send it to Mr. Green's office. That was one of my duties. The other one was to look up and find good stone cutters and hire them and have their names put on the payroll.

Q. Where did you take them to have their names put on the payroll? A. I took them to the master mechanic.

Q. Who was the master mechanic? A. Mr. Freas.

Q. To whom did you take them then? A. To the foreman whom they were going to work under.

Q. What was done then? A. The foreman would get a diagram for them and a stone and the necessary information for them to start work on the stone.

Q. Were you on duty at the building every day? A. Yes, sir; every day except four hours when I went to a funeral.

(579) during the whole time the work lasted.

Q. You did not take any vacation? A. No, sir; I did not take any vacation.

Q. And you were there every day except these four hours? A. Yes, sir; during all the time the work ran at the building.

Q. Did they work every week-day on the building? A. Yes, sir; that is, except two or three days, I believe we were closed down on account of something going on in the building and they could not go on with the noise.

Q. How long was that? A. I think it lasted three days.

Q. Did they work all day Saturday? A. Oh, yes, all day Saturday.

Q. A full day Saturday? A. Yes, sir; full day Saturday.

Q. What duties devolved on you in connection with the material there? A. I ordered all the material that we received.

Q. Do you know personally about the receipt of the material?

The WITNESS: Sir?

Q. Do you know personally about the receipt of the material after it was ordered? A. I don't know about that; but when we wanted to receive lumber or build a shed I would show the foreman carpenter what we wanted to do and he would measure the ground over and make up a list of the lumber we wanted and when the stuff came to the building he would receive it and vouch for it as to quantity and quality and sign

(580) the ticket for that.

Q. Who was that? A. Mr. Ashley, the foreman carpenter.

Q. And who had the duty of receiving the other materials and see that they were properly received and delivered? A. Well, there was a man on the work—

Q. What was his name? A. Mr. Looker.

Q. And who else had charge of that? A. Well, I think perhaps Mr. Freas would oversee that to some extent and receive the articles, and by and by they would be turned over to me.

Q. Mr. Freas was the master mechanic? A. He was the master mechanic.

Q. Then, you say these articles were turned over to you A. Yes, sir.

Q. Did you or not then have personal knowledge as to whether or not these articles were received on the work? A. Yes, sir; because they were turned over to me, although I kept no record of them at all. I ordered them today, perhaps, and received them tomorrow, and I found that we always got them.

Q. Will you look at these papers which I hand to you and tell his Honor and the gentlemen of the jury just what they are?

Mr. HARLEY: I understand that these are coming in subject to exception?

The COURT: Yes, sir.

(581) A. These are the quarry invoices.

Q. Quarry invoices for stone shipped where? A. Shipped to Washington, D. C.

Q. Does your name appear on each of them? A. They are in duplicate and my name appears on one of them.

Q. Now, what stone is represented in these invoices? A. This stone is for the south pavilion.

Q. Yes, but is that the stone sent to Baltimore or the stone that was sent direct to Washington after Mr. Graham stopped work? A. This is the stone that was sent direct to Washington.

Mr. MCLANAHAN: We offer these in evidence, as the invoices for the stone shipped directly to Washington from the quarry after Mr. Graham quit work in Baltimore. This begins at No. 166—it has ben testified that the others stopped at No. 165—and they run through to the 275th load.

(It is hereby agreed that the original invoices here referred to may be used in any court at the hearing or in argument in this case.)

Q. Do you know whether or not the 275th load was the last load of stone required to finish this work? A. I couldn't tell you sir. I kept a record of the stone, but I did not keep any record of the cars. The B. & O. transferred the stone from the C. V. cars to the B. & O. cars, and we might receive a car, but that might be part of two cars. I simply checked them by the invoices.

Q. But you looked over these and examined them and you can testify that you received the stone mentioned in these (582) invoices? A. Yes, sir; I can.

Q. Your name is signed to them? A. Yes, sir; my signature is on each one of them.

Q. Mr. Pirie, what sort of measurement is on these invoices? A. Quarry cube.

Q. Quarry cube measurements? A. Yes, sir; nothing cubed at less than 12 inches.

Q. That is the same as the other invoices have here? A. Yes, sir.

Q. It is the same on both those sent to Washington and on those shipped to Baltimore, to Mr. Graham? A. Yes, sir.

Q. Was Mr. Bailey's name on all these invoices? A. Yes, sir; his name always appears on all of them.

Q. You know his signature, do you? A. Yes, sir.

Q. Now, as to this organization which you had there at the yard. What was the duty of the foreman you had under you? A. His duty was to give the cutter a diagram and give him the stone for it and give him all the information about it and see that the man had tools, moulds and patterns, if the patterns were necessary.

Q. What was the blacksmith's duty? A. It was his duty to see that the under-blacksmiths under him kept up to the work and made tools, that is, if we needed any.

Q. How is granite cutting on the edge of the tools?

(583) The WITNESS: Sir?

Q. Is granite an easy or a bad stone to cut? A. Well, it is put down as being rather hard to cut. It takes pains to cut it.

Q. And do these tools stay sharp or not long? A. Yes, sir; the tools were good, as good as any can be made.

Q. Why did you need so many blacksmiths, you had eight blacksmiths? A. Because we had so many men for each blacksmith.

Q. What do you mean by men, stone cutters? A. Yes, sir.

Q. What was the duty of each blacksmith for the stone cutters he had there? A. To sharpen tools, one man would

sharpen one kind of tools for the whole gang and two or three would make up points of four or five, as was required.

Q. You say you employed on this work for a while about 150 men? A. About 150, sir, that is, cutters.

Q. 150 cutters? A. Yes, sir; I think there was about that number.

Q. Mr. Graham did not have as many as that, did he? A. No, sir.

Q. Will you state whether or not it was cheaper to have a larger amount of cutters with a given amount of work, or a (584) small number? A. I think the larger your force the better your organized help can run, and it costs less. If we made the work last longer it would have cost more.

Q. Why would it have cost more? A. We would have needed about the same organization.

Q. The same number of foremen, do you mean? A. No, not the same number of foremen—yes, we probably would have needed the same number of foremen, because our work was scattered in three or four different places around the building and we required a foreman at each place and we would have therefore had the same number of foremen and less men.

Q. How about the timekeeper? A. He would have been there just the same.

Q. What time did the men report for work in the morning? A. Eight o'clock.

Q. And worked until what time? A. Twelve.

Q. And when did they begin again? A. At half past one.

Q. Do you mean half past one? A. Half past twelve, I mean.

Q. And worked how long then? A. Until four.

Q. Suppose a man did not get there promptly at eight o'clock, what happened to him then? A. He could not get in the gate, the gate was closed.

Q. At eight o'clock? A. Yes, sir.

(585) Q. And what did he do then? A. He would have to wait until 9 o'clock and lose an hour.

Q. He would lose an hour? A. Yes, sir.

Q. Now, you said they worked until four, is that correct? A. I think so.

Q. It was not 4:30, was it—how many hours a day did they work? A. They worked eight hours; yes, it was 4:30.

Q. The 15th clause here in the specifications says: (reading) "The contractor shall provide all necessary patterns, guages, templates, squares, edges, tools, implements, machinery, buildings, materials, labor, etc., and transportation for the most prompt, expeditious, and complete performance of all work

involved in furnishing, preparing, and delivering at the site of the building all of the cut and rough granite called for in the contract." Will you state who prepared the necessary patterns and templates and guages in the beginning of the work? I mean before Mr. Graham quit, who made the necessary patterns and templates and cutter's diagrams? A. Well, Mr. Graham did not have anybody there on the work for that particular purpose and sometimes his son did it and sometimes I did it.

Q. You did it sometimes? A. Yes, sir; sometimes I assisted.

Q. Why did you do it? A. Well, to help matters along.

Q. Was that part of your duty over there? A. It was (586) not.

Q. Did Mr. Graham ever pay you anything for making up these patterns for him? A. No, sir.

Q. Did he ever offer to pay you for that? A. No, sir.

Q. You say Mr. Graham did not have anybody there at first to draw up these patterns, &c.? A. He had his son, who was a young man, of course, with little experience in that line.

Q. And how long was it before Mr. Graham got a regular draughtsman there? A. He did not get one until September.

Q. What year? A. 1907.

Mr. McLANAHAN: If your Honor please, we offered in evidence on Friday this statement showing the number of cubic feet in the work and quarry cube and it went into evidence but I do not believe it was transcribed on the record. It went in with the summary of the invoices and we would like to have this matter put in the typewritten record of the case.

The COURT: Very well.

(Paper referred to reads as follows:

"*Statement Contract 25.*

"March 22, 09.
Cube F

"Granite cut during Feb. & March,	1,600-8½
Previously reported,	33,910-9
Total cut at building,	38,511-5½
Cut by Graham,	29,031-10½
Total Stock in contract as per cutting schedules Quarry Cube.	67,543 4

WILLIAM PIRIE."

(587) Q. (Mr. McLANAHAN) Mr. Pirie, will you look at the paper which I now hand you, which is already in evidence, being the pay roll which was paid on May 2, 1908. It is the first pay roll for the work in this building including a sum of $3. Now, will you tell the jury what that work is which is charged to the Graham contract and whether that time was put on the Graham contract?

Mr. HARLEY: Of your own personal knowledge.

A. I don't know what the particular item is, but I have looked the pay rolls over and of course I did not discover anything wrong about them as far as I know. I did not make the pay rolls, I hired the men and there was a timekeeper who kept the time in a time book and made up the roll from that.

Q. Did you personally see the men working on this work? A. I did.

Q. Did you know their names? A. I knew their names at the time.

Q. Were you present when these men were paid off? A. I was always present when they were paid off.

Q. Do you know that each of these men was paid? A. I do.

Q. Personally? A. Personally I know that.

Q. How did you happen to be present when the men were paid off? A. I was always present at the work and on pay days the foreman lined the men up according to their numbers and I stood there at the window to see that the right men got (588) the right money.

Q. This first voucher contains an item of two days' time to J. T. Waters, No. 143 on this voucher, and it is charged to Mr. Graham's account; the amount is $3. Do you know personally whether or not Mr. Waters did that work? A. That is the man whom I used to borrow from Mr. Freas when some of my tool boys or laborers were absent.

Q. What did he do? A. He might carry tools or he might work in the shed as a laborer.

Q. Do you know whether or not he did this work mentioned on this pay roll? A. I could not swear that, but I could swear that I borrowed the man from Mr. Freas when my men were absent.

Q. You have testified that Mr. Freas was master mechanic. Was he master mechanic over part C or over the whole building? A. He was master mechanic over the whole building and he had more or less to do with the contract. He would take a man's name and put it on the pay roll and sometimes when a man wanted to leave he would give him his time if he happened to be in the office.

Q. Did Mr. Freas pay a man when he got his time that way? A. Oh, no.

Q. How did he get it? A. He got his time and he carried it to the office.

(589) Q. Now, I hand you another pay roll which is already in evidence for the last part of April, 1908, and I will ask you to look over the names of the men signed there and state whether or not they are their signatures, if you know, and whether or not those men worked on this work at the time mentioned in the pay roll. The amount of that is $315.76? A. This is a pay roll of carpenters and laborers on the Government roll and they all worked more or less on our work in rigging up and fitting up to begin with.

Q. Do you know those men's names there? A. Yes, sir; I know the most of them.

Q. Do you know whether or not they are their signatures (indicating)? A. I could not testify to that, because I did not see the roll signed.

Q. Who did see the men sign the roll? A. Mr. McDonald would see his men sign, and Mr. Ashley would see his men sign.

Q. And none of these men are stone cutters, are they? A. I don't see any stone cutters on that roll.

Q. What do you say these men did? A. I see John McDonald's name there and I suppose that was for setting up derricks and so on.

Q. This was before you actually began work on the building? A. Well, we had begun them, because we had begun when he was setting up derricks.

Q. Now, will you look at this pay roll and say whether or not you know these men's names as they appear there and (590) whether or not they worked, this is the pay roll from the first to the sixteenth of May? A. This is not a pay roll of stone cutters but of carpenters and laborers, &c., who would be clearing away and making room for us and rigging up derricks, &c.

Q. So you don't know what work was done in that connection? A. No, I do not.

Q. Will you look at this pay roll which is for the last half of May, 1908, and state whether or not you know those men did the work, the men whose names are mentioned on there? A. Yes, sir.

Q. And if you know if any of them did their work, please state which ones? A. I am right familiar with this pay roll. This is a pay roll of stone cutters and laborers who worked on the Graham work.

Q. Do you know that these men did the work? You know that personally? A. I know that personally, yes.

Q. This is the pay roll voucher for the first half of June, 1908. Will you look at that and state whether you know personally that the men who were mentioned on that pay roll actually did that work? A. This is also a pay roll of the stone cutters and laborers who worked on the Graham work.

Q. Do you know that personally? A. I do.

Q. Look at the pay roll voucher for the last half of June, 1908, and state whether or not you know that the men whose (591) names appear on this voucher did their work on this Graham contract, or worked on the Graham contract? A. This is also a pay roll of the stone cutters and laborers named who worked on the Graham contract.

Q. Do you know that personally? A. I do.

Q. And they worked during the time mentioned on this pay roll? A. I think they did. They were there all the time.

Q. Will you look at the pay roll voucher for the first half of July, 1908, and state whether or not if you know these men worked on the Graham contract at that time? A. This is a pay roll of stone cutters, laborers, blacksmiths and engineers, etc., that worked on the Graham work.

Q. Do you know that personally? A. I do.

Q. This (indicating) is the pay roll voucher for the second half of July, 1908; will you look at that and state whether or not these men whose names appear on there did the work on the Graham contract during that time? A. This is a pay roll of stone cutters, laborers, blacksmiths, engineers, &c., that worked on the Graham work.

Q. Do you know that personally? A. I do.

Q. Will you look at the pay roll for the first half of August, 1908, and state whether or not you know personally that the men worked during that time doing the work on the Graham contract, that is, No. 1,625? A. This is also a pay roll (592) for the workmen on the Graham work.

Q. Do you know that they did their work on there personally? A. I do.

Q. Look at this voucher No. 1,636, being a pay roll for the second half of August, 1908, and state whether or not the men whose names appear on this pay roll did their work during this time on the Graham contract, if you know that personally? A. This is also a pay roll with the names of the men working on the Graham contract.

Q. Do you know personally whether or not they did that work? A. I do.

Q. Will you look at this voucher which is for the first half of September, 1908, No. 1,660, and state whether or not the work mentioned there was done? A. This is also one of the Graham pay rolls with the stone cutters and blacksmiths, and so on, on it.

Q. Do you know whether or not they did that work mentioned in that voucher? A. I do.

Q. This voucher No. 1,717 for the second half of September, 1908, will you look at that voucher and state whether or not that work was done at this time by these men? A. This is also a pay roll of the workmen on the Graham work.

Q. Do you know whether or not they did that work? A. I know they did the work.

(593) Q. This is voucher No. 1,733 for the first half of October, 1908. Will you look at that and state if the men whose names appear there did the work under the Graham contract at that time? A. This is also a pay roll for cutters, laborers, blacksmiths, engineers, &c., on the Graham work.

Q. Did they do their work during that time? A. They did.

Q. This (indicating) is voucher No. 1,740 for the second half of October, 1908. Please state whether or not if you know these men did the work under the Graham contract at that time? A. This is also a pay roll of the workmen on the Graham work.

Q. Did they do the work during the time mentioned in this voucher? A. They did.

Q. This (indicating) is voucher No. 1,793 for the first half of November, 1908. Did these men work on that contract during the time mentioned in that voucher? A. This is also a pay roll of the workmen who worked on the Graham contract.

Q. And did they do the work mentioned there? A. They did.

Q. Voucher No. 1,856 for the first half of December, 1908; will you state whether or not these men did the work on the Graham contract during the period covered by that voucher? A. I recognize the names as being the names of the men working on the Graham work.

(594) Q. Do you know whether or not they did that work mentioned there? A. I do know that they did the work.

Q. That is for the second half of November, 1908. Now, this is more of the same voucher, is it not? A. Yes, sir; this is for about the first half of December. I recognize it as being one of the pay rolls we used.

Q. Do you know whether or not these men did that work there during that time? A. I do know that.

Q. This (indicating) is No. 1,868, for the second half of December, 1908. It has been testified to that on this voucher there were three items charged to Mr. Graham, namely: G. Bianci, a carver, at $2.25; R. Conroy, a stonecutter, $10.35, and Elmer Clemens, a stonecutter, $10.35. Will you look at this pay roll and state whether or not these three men did that

work on the Graham contract, if you know? A. These men did work on the Graham contract.

Q. What did they do? Why did you have them on this pay roll? A. I cannot remember just at this time.

Q. Do you recognize those names as being the names of men who worked under that contract? A. I remember them working on that contract; but somebody else could explain it better than I could.

Q. Now, this is voucher No. 1,869, for the second half of December; will you state whether or not the men whose names appear on that voucher worked on the contract during that half (595) of the month? A. I recognize this pay roll as containing the names of the men who worked on the Graham contract as stonecutters, laborers and engineers.

Q. Did these men work on that contract during that time? A. They did.

Q. This is the voucher for the first half of January, 1909. Will you look at that voucher and state whether or not the men mentioned there worked on the Graham contract? A. I recognize this as being one of the pay rolls for the Graham work.

Q. Here is the voucher for the first half of January, 1909, which shows that John Viola did work for $13.50; will you state whether or not John Viola, if you can remember, did any work during that part of the month? A. John Viola worked on the Graham contract at that time.

Q. Do you remember that personally? A. I remember that, but I cannot state exactly what he was, he was a carpenter and he was there from time to time, but I could not state that now without looking my memorandums which I have.

Q. Well, this is pay roll No. 1,954 for the second half of January. Will you tell me whether or not the men whose names appear on that voucher worked on this contract in the second half of January, 1909? A. I recognize the names on this roll as being the names of men who worked on the Graham contract.

(596) Q. During that time? A. Yes, sir.

Q. This is No. 1,953 for the second half of January, 1909, and it appears that John Diggs, a laborer, was charged on this contract with 8s. Can you tell anything about that? A. No, sir; I couldn't state just what he did.

Q. Do you remember anything about his name? A. I might have borrowed the man from Mr. Freas to take the place of a laborer who was absent.

Q. But you don't remember that, you said? A. I don't remember that particularly.

Q. This (indicating) is voucher 1,989, the pay roll for the first half of February, 1909. Will you look at that and say whether or not those men worked on the building, on the

contract during the first part of February, 1909? A. Yes, sir; I recognize this as being the roll of the Graham work.

Q. Do you know whether or not the men here did the work during that time? A. They did do that work.

Q. This is the voucher for the second half of February, 1909. Can you tell us whether the men mentioned there did the work under that voucher during that time? A. This is a roll of the contractors and carpenters working on the Graham work.

Q. During this time? A. Yes, sir; during this time.

Q. This (indicating) is the voucher for the pay roll for (597) March, 1909, the first half, can you tell us whether or not the men whose names appear there did work during that time? A. This is for stonecutters, laborers, engineers, &c.

Q. It mentions here stone carvers at $5 a day. What was their duty? A. To take the stone after it was cut—that included all of this ceiling here (indicating), all of this here which runs in here (indicating), and under here, that was part of Mr. Graham's contract.

Q. That was part of Mr. Graham's contract? A. Yes, sir.

Q. Did they carve the caps of the columns? A. No, sir.

Q. Or the pilasters? A. No, sir.

Q. Well, what else did they carve? A. Up here, that course and this course, and this course here and underneath and around the ceiling (indicating).

Q. I notice here the first stonecutter, John Beer, is put down here at $4 instead of $3.60? A. He was a foreman and they got $4.50 a day, and when the work got very near through we made him a carver at $4 per day.

Q. It appears here that he was a stonecutter? A. Well, he was a carver.

Q. James McConnell appears here as a tool dresser? A. He was foreman and he received $4 per day.

(598) Q. What did you need riggers for, did you have them all the time? A. No, sir; we only got them once in a while to tighten up guys and overhaul the derrick if necessary.

Q. There is a charge here of one-half day each on this pay roll (indicating)? A. Yes, sir.

Q. Now, this is voucher No. 2,101 and it is for the second half of March, 1909. Will you look at it and say whether or not these men worked on the Graham contract during that time as set forth in the voucher? A. This is a list of a few stonecutters, some carvers and laborers and one thing or another. It was finishing up on the Graham contract about this time.

Q. Well, do you know whether or not they did that work? A. They did the work.

Q. This is voucher No. 2,144, the pay roll for April, 1909. Will you say whether or not the men are mentioned there did the work on the completion of Mr. Graham's contract during that time? A. This is also a list of a few stonecutters and carvers that were left finishing up the work at that time.

Q. Do you know personally that those men did that work? A. I do know that they were there.

Q. Did you see all the men paid whose names appear in all these pay rolls which you have gone over? A. I always saw the men paid.

(599) Q. You saw them get their money, did you? A. Yes, sir.

Q. In pay envelopes? A. Yes, sir; they paid them in envelopes.

Q. You did not see the actual money but you saw the envelopes? A. Yes, sir; I did not see the money counted, but I saw them get the envelopes. If a man's envelope was wrong we would very soon find it out.

Q. How would you find out? A. Well, the man would call our attention to it, and that was only done on one or two occasions, and I think we found then that the man was wrong and that the pay was all right.

Q. Voucher No. 1333 was put in evidence and it is for personal services for you, April 4, and the amount is $116.67. Will you look at the voucher and state whether or not that amount of $116.67 charged to the Graham contract is the correct charge to the Graham contract. The total amount of that voucher is $175. A. Yes, sir; I should say that is correct.

Q. Now, this is a voucher made to you, what did you do on account of Mr. Graham's contract for that $116.67? A. I worked on the Graham contract until Mr. Green took me off and put me on something else and then what I did not do for him was charged to the Government.

Q. When did you begin with him—this says March 9-28, inclusive, 20 days at $175 per month or $116.67. That means that you started to work on the completion of Mr. Graham's contract on March 9, doesn't it? A. Yes, sir; I should say that is it.

(600) Q. When did you actually begin work on the completion of Mr. Graham's contract, do you remember? A. I don't remember; I was over here at Baltimore and back and forth between that and the building for some time.

Q. Was that during this time from March 9 on when you were doing that kind of work? A. No, sir; this would be when the work was finished.

Q. This is March 9 to the 28th, inclusive. When did Mr. Graham quit his work over here? A. He stopped in March, 1908, I think.

Q. And who had charge of the stone in the yard there and in taking it over to Washington? A. I did that, I think.

Q. Is that the pay which you received there in that voucher for doing that? A. Yes, that March, I believe I went on to some other work, I think I went up to Milford and what I did for the Graham contract was charged here and the balance has not been charged.

Q. When did you go to Milford, Massachusetts? A. In March, I think.

Q. Did you go there after Mr. Graham quit work? A. Yes, sir; I did.

Q. How long after? A. A couple of weeks; I think.

Q. How long were you away? A. I was away several days.

(601) Q. Were you away a week? A. I would not just like to say. I have memorandums of that, but it has been three years ago.

Q. I notice that this is a charge from the 9th to the 28th of March and does not include either the first part of March or the last three or four days of March? A. Yes, sir.

Q. After you began regularly to superintend the completion of the work in Washington and to superintend the cutting of the stone from Graham's yard to Washington, how much were you paid a month until the contract was finished? A. Paid $175 a month.

Q. And did you receive that each month? A. I did.

Q. Was that the sum paid to you as inspector before Mr. Graham quit work? A. Exactly the same pay.

Q. Now, voucher No. 1,381, dated May 12, represents a payment to Lansburgh Brothers of $29.40 for cotton cloth. Now, tell us whether or not that was received, that cotton cloth? A. That was received.

Q. Do you know personally about that? A. I do know that it was received.

Q. What was it used for? A. It was used for the temporary cover over the stonecutters, it being the cheapest article that we could cover them up with.

Q. Have you examined all the vouchers for material furnished which have been put in evidence in this case and testified to by Mr. Green? A. I spent Saturday looking them all

(602) over and I did not find—

Q. You say you have examined all the vouchers which have been put in evidence in this case and testified to by Mr. Green? A. Yes, sir.

Q. Referring to the material received at the building? A. Yes, sir.

Q. (The Court) You mean outside of the stone? A. Yes, sir.

Q. (Mr. McLANAHAN) Now, will you state whether or not the material shown in all these vouchers was received at the building, if you know, personally?

Mr. HARLEY: I object to that, your Honor.

The COURT: I overrule the objection.

To the propounding of which question, the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to answer said question.

Mr. HARLEY: Note exceptions, please.

A. I will state to the jury that I spent Saturday reading them over and there was no voucher for material that we did not receive.

To which action of the court in overruling the defendants' objection to the said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their twenty-fourth bill of exceptions, which is accordingly done this 2nd day (603) of November, 1910.

THOS. J. MORRIS. [Seal]

Twenty-fifth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exception, all of which are hereby incorporated in and made a part of this, their twenty-fifth bill of exceptions at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

Q. Did you look at each voucher? A. Yes, sir; I looked at every voucher.

Q. And you are familiar with the items on each of those vouchers? A. I am familiar with the items.

Q. (Mr. PIERCE) Under clause 12 of the General Instructions and conditions, the following is set down: "Proposals must be prepared without assistance from any person connected with or employed under this office." And then section 21 says:

"It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute
(604) or relative in the same. Bidders, or their authorized agents, are expected to examine the samples and drawings referred to in the specifications, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies." Do you know whether or not Mr. Graham ever visited Bethel quarry personally? A. I am not aware that he ever visited Bethel quarry.

Mr. HARLEY: What clauses were they?

Mr. MCLANAHAN: Nos. 12 and 21 of the General Conditions.

Q. Now, do you know whether or not your office ever furnished to Mr. Graham any statement of the amount of cubic feet of stone required for this job, for the contract before the bids were made? A. I don't think they did.

Q. What was the estimate that you put on it, you testified that you estimated this stone at net dimensions to be about 61,000 cubic feet? A. Yes, sir.

Q. Have you the summary of that estimate, which was asked for by Mr. Harley? A. Yes, sir; I have it.

Mr. HARLEY: I called for the calculation.

Mr. MCLANAHAN: We offer in evidence this copy produced in accordance with the request of the other side and exam-
(605) ined by them, which is a copy of the estimate which Mr. Pirie made in October, 1906, before the bids were submitted. The estimate is on the basis of cubic net dimension measurement and not quarry measurement.

Q. (Mr. MCLANAHAN) That does not include any of the extras afterwards put in, does it? A. No, sir.

(The paper referred to reads as follows:)

"BUILDING FOR NATIONAL MUSEUM.

Copy of Estimate.

"October 13th, 1906.

PORTION C.

"Summary of cubic contents all stone above the 1st floor, National Museum Building.

	"Sheet No. 1		717	0		
8 Columns Bases and Caps	" "	"	7,900	0		
2 Pilasters Bases and Caps						
	Sheet No. 1		1,024	4	1,024	4
Base Course A	" "	"	279	5	279	5
	" "	2	3,564	5	3,564	5
Cornice Extension Pier 88						
	Sheet No. 2		403	2	403	2
	" 3		1,192	11	1,192	11
	" 4		555	7	555	7
Main Entrance	" "		978	6		
	" 5		1,338	1	1,338	1
	" 6		653	0	653	0
(606)						
Main Entrance (cont'd)						
	Sheet No. 6		5,398	0		
	" 7		3,981	5	3,981	5
	" 8		5,020	0	5,020	0
Dome	" "		5,205	2	5,205	2
			38,211	0	23,217	6
			23,217	6		
Total cubic feet net dimensions,			61,428	6		

Q. Did you ever have any conversation with Mr. Graham as to the number of cubic feet in this contract prior to the time when the contract was made with him? A. Yes, I think I did mention that I found that there was about 61,000 cubic feet of stone in the contract.

Q. Did he make any reply to that? A. Yes, his remark was that I was wrong, and that his architect and he had both figured it and they planned it between fifty-five and fifty-six thousand cubic feet in the work.

Q. Did you ever mention this subject to him after that? A. I don't think I did.

The COURT: What did Mr. Pirie say was his estimate?

Mr. McLANAHAN: 61,000 cubic feet, and Mr. Graham's was between fifty-five and fifty-six thousand.

Q. Now, was that before or after the bids were put in? A. It was the day that the bids were put in.

Q. Was it in Washington or in Baltimore? A. In Washington; I had not been to Baltimore then.

(607) Q. Who was present at that conversation? A. I think Mr. Green's chief clerk was present.

Q. Mr. Sheehy? A. Mr. Sheehy.

Q. Do you know whether after Mr. Graham started in to do this work he still adhered to this original estimate of his? A. I think he adhered to that until nearly the end of the contract.

Q. Nearly the end of the whole contract? A. Until nearly the time that he stopped.

Q. Stopped work? A. Yes.

Q. Did he change his opinion then?

Mr. HARLEY: Objected to.

Mr. McLANAHAN: He said he had adhered to it until then.

(After argument.)

Q. Did he then express to you in any way that he changed his opinion? A. He did not express to me in any way that he changed his opinion.

Q. Well, what makes you think, then, that he did change his opinion?

Mr. HARLEY: Objected to.

Q. Well, do you know whether any facts were brought to his attention at that time as to the actual number of cubic feet of stone in the work? A. I believe Mr. Graham went to Mr. Green's office about that time—

(608) Q. Is this what you know personally? A. I don't know that personally. I did not discuss that with Mr. Graham at all.

Q. Well, coming back to this material for a moment, Mr. Piric, who had charge of ordering in the first place—who had charge of making the orders for all the material required in finishing the contract at Washington? A. The orders were all made through me first.

Q. The orders were all made through you first? A. Yes, sir.

Q. When you first started the work did you give any estimate of what would be needed to any one? A. Not as a whole. I did not give any estimate of what would be needed, no.

Q. I mean from time to time? A. Yes, sir; as it appeared that we needed the articles we ordered them.

Q. And how was the order put in, what course did it go through? A. I would make an order up and go to the master mechanic and tell him that we needed such and such a thing and if it was a piece of a shed he would let his foreman carpenter come and look it over with me and he would make up the list if it was lumber, and if it was tools I would make it up.

Q. How about other material? A. We had used some compressed air in the work and if it was piping and stopcocks, etc., Mr. Titlow would do it, and I would show him what we wanted to do and he would make up the amount of piping (609) or whatever was needed, &c.

Q. And what would the master mechanic do then? A. Make out a requisition for it and forward it to Mr. Green's office.

Q. And you would not know anything more about it until it came on the work? A. I would not know anything about it until it arrived.

Q. Would you recognize the requisitions as made out? A. I did not see them.

Q. They were made by Mr. Freas? A. Yes, sir; I could recognize the articles, but not the requisitions.

Q. A number of the vouchers are for team service and the vouchers are made payable to Mr. Houser. Will you state what that team service was? A. When the stone arrived in Washington it had to be taken off the teams wherever we could find most room for it, and by and by we wanted the stone in the stone shed or in the basement of the building, where nearly one-third of the work was cut, without requiring any shedding or roofing, and of course we had to load it up and take it in there as we wanted it, and if we did not do that we would fill up with work.

Q. Who did that work? A. John Houser's teams did it.

Q. How did he charge for that? A. At the rate of $5 per day, that is a pair of horses and one man.

(610) Q. Who kept track of that? A. Well, we all kept track of it, because we could not get along without the team. We had to have it, and in the evening the paymaster would consult me about the team, whether it had been there working all day, &c., and I would be prepared to vouch for that at that time.

Q. Whom did you give that to? A. Mr. Hagan.

Q. You gave it to him every night? A. Yes, sir; he would consult me about that, I had charge of the team, and he would come and see me about the team.

Q. Did you keep any record of the team's time? A. I did not. I turned it in every day.

Q. You merely reported verbally to him? A. Yes, sir.

Q. And did he put it down anywhere? A. He kept it in his book, I suppose.

Q. And that was Mr. Hagan? A. Yes, sir; Mr. Hagan.

Q. There are a number of items payable to the Merchants Transfer & Storage Company. The vouchers show that they were paid for hauling stone to the building. Will you state what you know about that service? A. I can only state that the Merchants Storage Company hauled all the stone that was taken from Graham's yard and shipped to Washington, they hauled the stone that was shipped from Bethel direct to us too. They hauled it from the station to the building.

Q. Do you know whether or not they hauled all the stone? A. I think they hauled all the stone.

(611) Q. How do you know that, did you keep any check on it at all? A. No, I did not. I did not keep any record of that; I simply saw the teams, and I know they brought in the stone and I checked it off on the invoice, and I was not paying much attention to who was bringing it there so long as it was coming in.

Q. You checked the stone from the invoice, now can you say not that all the stone marked on these invoices and receipted by you was received at the building? A. I can say that.

Q. And do you know of any one else bringing it there besides the Merchants Transfer & Storage Company? A. Not under that contract, I don't think.

Mr. McLANAHAN: That is all.

Cross Examination.

Q. (Mr. HARLEY) Mr. Pirie, I understood you to say that it was absolutely impractical to go ahead with the quarrying without these setting plans on this job, is that correct, please, sir? A. Well, that would be correct on part of the work, whilst it was possible to do it on some of the plainer parts of it.

Q. But on this particular job you could not go ahead at the quarry without the setting plans as a rule, is that correct?

(612) A. Oh, you could not go ahead without them.

Q. You could not do anything at the quarry without the setting plans? A. No, that is, not to begin at the lower course and carry the work up, you know.

Q. You could not do it? A. No.

Q. Now, you have testified that you, during the time that this work was being done received $175 a month. When you

were in Baltimore who paid that money, please? A. I was paid that through Mr. Green's office.

Q. You were paid by the Government when you were working here in Baltimore? A. I was.

Q. And your compensation was not charged to Mr. Graham's job in any way, was it? A. Not while I was in Baltimore, then I was inspector, and it was not charged to Mr. Graham.

Q. But when you went to Washington to work on the job you got the same compensation? A. I did.

Q. And the Government paid you and that was charged to Mr. Graham's contract, is that correct? A. I believe it is shown so.

Q. Now on the record, page 727, you say: "Quarry cube is nothing less than 12 inches. In cubing a stone you take net dimension less than 12 inches. If it is less than 12 inches you call it 12 inches. If it is 6 inches or 8 inches on the plans (6613) you take that, but if it is the quarry dimension and it is 6, 8 or 10 inches, then you call it a foot all the time." Now, I do not quite understand that and I would like to ask you in this quarry measurement do you count 6 inches as a foot? A. In the quarry measurement you count 6 inches as a foot.

Q. In the quarry cube would you count 3 inches as a foot? A. I would.

Q. Any fractional part of a foot you count as a foot? A. I would like to state that it is not practical to cut stones out in a granite quarry less than 3 inches, so we did not have them to deal with.

Q. So anything from 3 inches to 12 you would call a quarry cube? A. Yes, sir.

Q. Then the quarry measurement is short of the actual measurement? A. If the stone is 6 inches and cubed at 12 inches, then of course it is short. If the stone was 6 inches and cubed at 12 inches the stone would be less than the cube at 12 inches.

Q. Of course, just as 6 inches or 3 inches are less than 12 that is how much it would be short? A. Well, it is not practical to cut stone out of a quarry at 3 inches.

Q. I thought I understood you to say that it was not practical to cut it out under three inches? A. It is not practical to cut it out at three inches?

Q. Is it practical to cut it out at 1? A. Well, hardly. (6611) Q. I did not understand you, what did you say? A. I say hardly practical.

Q. With this quarry cube measurement, according to that you may call 4 inches a foot—that is, if you got a stone out at

4 inches you would call it a foot? A. Yes, but a 4 inch stone has not been used on the building.

Q. Well, if it was 6 inches you would call it a foot? A. I would call it a foot.

Q. And if it was 11 inches you would call it a foot? A. Yes, sir.

Q. So this quarry cube measure is not only a short measure but it is an irregular measure, is it not? A. It is a regular measure in all the Eastern granite quarries. It is a system that they have, and any fraction of a foot is counted as a foot.

Q. (Mr. HARLEY) And according to that system of measurement, four inches counts as much as eleven inches? A. But we do not have four inches in this particular building—there is no stone less than eight inches there.

Q. Was there any stone five inches? A. It is not practical to quarry a stone at four inches. If he wanted a four inch stone he would quarry it larger.

Q. Well, let's take five inches?

The COURT: He said that the smallest stone in the building was 8 inches.

Q. (Mr. HARLEY) The smallest stones in the building were eight inches? A. No, there were some few a little smaller. (615) Q. What size? A. There were some about 8 inches front and they brought them down in back—

Q. Well, you call that three inches a foot? A. But the quarry did not furnish those stones?

Q. Did they furnish any at 8 inches at all? A. I suppose some.

Q. Any at 11 inches? A. Oh, yes.

Q. And at 10 inches? A. Yes, sir.

Q. Now, didn't you count the 8 and 10 and 11 inch stones exactly the same? A. Yes, sir.

Q. For what purpose did he count them?

Mr. HARLEY: In making a calculation according to the quarry measurement which was afterward sent to Washington and there corrected up.

Q. Now, you stated at page 732 that the dimensions on these invoices are the dimensions on the plan. Is that correct?

Mr. HILL: Will you show me that, please?

Mr. HARLEY: Yes, sir; there it is (indicating). That is these dimensions (indicating)? A. Yes, these dimensions are on the quarry invoice.

Q. These dimensions on these invoices are the dimensions shown on the plan, is that correct? A. The dimensions are the figures from the plan. The stones are cubed at nothing less than one foot.

(616) Q. Now, that (indicating) is your signature, is it not? A. Yes, sir.

Q. And that is marked shipment No. 1? A. Yes, sir.

Q. Tell the gentlemen of the jury how many stones you shipped on that occasion? A. There were 26 stones.

Q. 26 stones; now, how many quarry cubes—how many cubic feet according to the quarry cube system? A. The invoice shows 306 feet 10.

Q. And the actual measurement in that case is also given at 306 feet 10, is it not? A. I don't know, sir.

Q. Mr. Freas' signature is to that also, is it not? A. His signature is to that, but I am not prepared to say what he did.

Q. Well, you know it is O. K'd. A. I know it is O. K'd by Mr. Freas.

Q. At 306 feet 10. Now, you know that is correct?

Mr. McLANAHAN: What is correct?

A. I know that is correct as to the quarry cube.

Q. You inspected it? A. Oh, yes.

Q. And you saw that it was shipped? A. Yes, sir.

Q. Now, I hand you the second shipment. Whose signature is that? These papers are already in evidence? A. That is my signature.

(617) Q. How many stones were shipped from Baltimore to Washington on the second shipment? A. 24 stones, apparently.

Q. How many? A. 24.

Q. And what was it that you added to that? You know that is correct, do you? A. I think so.

Q. That is your signature to it? A. Yes, that is my signature to it.

Q. How many quarry cubes? A. 296.9.

Q. 296.9? A. Yes, sir.

Q. How many actual feet? A. There is a red figure here with 270 feet and some fraction.

Q. 270.84? A. Yes, sir.

Q. Now, look at this and state what this is? A. That is another invoice.

Q. Signed by you? A. This is an invoice of the third load with 16 stones and it is signed by me.

Q. Was 16 stones correct? A. 16 stones, I think, would be correct.

Q. Look over that and see if 16 is right, now? A. I should say that 16 was correct.

(618) Q. How many quarry cubes, how many feet according to the quarry system? A. 320 feet 11 inches.

Q. That 11 stands for inches, does it not? A. Yes, sir.

Q. How many actual feet? A. I would say this is 315.

Q. Are those Mr. Freas' figures? A. Yes, sir; I guess it is.

Q. That is 314.13; look and see if that is correct? A. Those are the figures there.

Q. Look at this paper and state what that is, please? A. This is an invoice of the sixth load, 16 pieces, also signed by me.

Q. How many stones went on that shipment, do you know? A. 16 stones.

Q. 16 on the fourth shipment, and how many quarry cubes? A. 305 feet and 4 inches.

Q. And how many actual feet? A. 304.41.

Q. Now, look at this and state what this is (indicating)? A. This is an invoice of the fifth load with 16 pieces also.

Q. How many stones did you ship that time? A. 16 stones.

Q. Now, how many quarry cubes? A. 360 feet 3 inches.

619 Q. How many actual? A. 368.14.

Q. 368.14, is that right? A. Yes, sir.

Q. Look at the paper which I now hand you and state what that is. A. This is the sixth load containing 26 pieces.

Q. 26 pieces? A. Yes, sir.

Q. And signed by you? A. Yes, sir.

Q. Do you know that those 26 stones went? A. I think they did.

Q. You would not have signed this if they had not? A. Not likely to.

Q. How many stones is this? A. 26 stones.

Q. How many quarry cubes? A. 370 feet 11 inches.

Q. How many actual? A. I think it is 373.85.

Q. 373.85, is it not? A. I think so.

Q. Look at this paper and state what this is? A. This is the seventh load.

Q. Did you sign that? A. I did sign that.

Q. Did you check it off and do you know that it is right? A. Yes, sir.

(620) Q. How many stones did you ship on your seventh load? A. 20 stones.

Q. How many quarry cubes? A. 271.10.

Q. How many actual cubes? A. 252.79.

Q. Now, look at this paper and state what this is? A. That is the eighth load, with 24 stones.

Q. How many stones? A. 24.
Q. Did you sign that? A. I signed this.
Q. Did you ship the 24 stones? A. Yes, sir.

Q. (Mr. McLANAHAN) Did you ship them? A. Well, Mr. Graham put them on the car and I looked them over to see if they were all there.

Q. You did not have anything to do with the shipping yourself? A. No, sir.

Q. (Mr. HARLEY) How many quarry cubes are there? A. 341.8.

Q. How many actual cubes? A. 297.56.

Q. Look at this paper and state what it is? A. This is the ninth load.

Q. Is that your signature? A. That is my signature.

(621) Q. How many stones did you ship on that occasion—or, you examined them and saw that they were all there, didn't you? A. Yes, 36 stones.

Q. I say your practice was to examine them and see that they were all there? A. Yes, sir.

Q. How many quarry cubes? A. 435.11.
Q. How much? A. 435 feet and 11 inches.
Q. How many actual cubes? A. 400.
Q. And what fraction? A. Well, I cannot tell.
Q. 11 is it not?

The WITNESS: I don't know what you would call that.

Mr. HARLEY: You think it 400 even?

Mr. McLANAHAN: Yes, that is right.

Q. (Mr. HARLEY) Then that makes on the ninth shipment 36 stones, 435.11 quarry cubes and 400 actual? A. Yes, sir.

Q. Now, look at this invoice and state whether or not that is your signature? A. That is my signature.

Q. Did you check these up to see if they were all there? A. I checked them up.

Q. How many stones did you ship on that occasion? A. (622) 377.01.

Q. No, I asked you how many stones? A. 28 stones.
Q. 28 stones? A. Yes, sir; 28 stones.
Q. And how many quarry cubes? A. 371.01.
Q. How many actual? A. 370.82.
Q. Look at this paper, please, sir. A. This is an invoice of the eleventh car load.

Q. Eleventh car load? A. Yes, sir; with 20 stones.

Q. Is that your signature? A. Yes, sir; it is my signature.

Q. It is? A. Yes, sir.

Q. And you checked up how many stones? A. 20 stones.

Q. How many quarry cubes? A. 266.01.

Q. How many actual? A. 255.83.

Q. Look at this paper? A. This is the twelfth shipment, with 25 stones.

Q. What shipment is that? A. No. 12.

(623) Q. How many stones? A. 25 stones.

Q. Did you check that up yourself? A. I did, sir; yes, sir.

Q. What is that at the bottom there (indicating)? A. Well, that appears like there had been 42 small stones shipped on that car.

Q. Don't you know that as a matter of fact there were 67 stones that were shipped on that occasion? A. Well, I meant Museum stones.

Mr. Hill: You can explain that.

The Witness: I did not know that you were asking me about stones that went to other places. I just testified that there were 25 stones on the car for the Museum.

Q. (Mr. Harley) And what were the other stones? A. 42 stones for Malmati.

Q. And they had nothing to do with this contract? A. No, sir.

Q. There were how many that did have something to do with the contract? A. 25 stones.

Q. How many quarry cubes? A. 372.01.

Q. How many actual? A. 359.22.

Q. Look at this paper, please, sir? A. This is the thirteenth load, 41 pieces.

Q. The thirteenth load? A. Yes, sir.

(624) Q. You shipped 41, is that correct, sir? A. Yes, sir; that is correct.

Q. And how many quarry cubes? A. 551.10.

Q. How many actual? A. 512.52.

Q. Look at this one, please, sir? A. This is the fourteenth load of 28 stones.

Q. Fourteenth load? A. Yes, sir.

Q. And did you ship 28 stones on that load? A. Well, I see there are 27 stones that went on the car for the Museum building and also 53 stones for the Malmati.

Q. But Malmati has nothing to do with this contract? A. No, sir.

The COURT: Was that another contract that Graham had?

Mr. HARLEY: Yes, sir.

Q. Now, how many were shipped on that invoice for the National Museum Building? A. 27 stones.

Q. Is it 27 or 28? A. Well, it is marked 27 here (indicating) and it is marked 28 on the back.

Q. 28 is right, is it not? A. Well, I will have to count it. It shows 27 one place and 28 another. I will count them. I will state that the 27 shown here is correct, as I count them. I will turn them over to the jury and let them count them.

(625) Q. Adding this one stone (indicating) down here, don't that make 28? A. Yes, sir; that is correct.

Q. That is correct? A. Yes, sir; there are 27 here and one comes in afterward.

Q. How many quarry cubes, please? A. The quarry cube appears to be 292 feet.

Q. How many actual? A. 245.42.

Q. Now, look at this one? A. This is an invoice of the fifteenth load of 18 pieces.

Q. Is it signed by you? A. It is signed by me.

Q. How many pieces? A. 18 stones.

Q. Do you know that they were shipped? A. It says August 13th, 1907.

Q. How many quarry cubes? A. It was 254 feet.

Q. Actual how much? A. 238.89.

Q. Now, take this one (indicating). A. This is the sixteenth car load with 31 pieces.

Q. What car load is it? A. The sixteenth.

Q. Signed by you? A. Yes, sir.

(626) Q. And how many pieces did you ship? A. 31 stones.

Q. You shipped 31 stones; how many quarry cubes? A. 381.01.

Q. Actual? A. 374.88.

Q. Now, this one, Mr. Pirie, if you please, sir? A. This is the seventeenth load with 32 stones.

Q. Signed by you? A. Yes, sir.

Q. Shipped by you or under your supervision? A. Well, shipped by Mr. Graham.

Q. But under your supervision? A. Yes, sir.

Q. Under your inspection? A. Yes, sir.

Q. How many quarry cubes? A. 448 feet.

Q. How many actual? A. 424.03.

Q. How much did you say the quarry cube was? A. 448.

Q. Look at this one, please, is that your signature, sir? A. Yes, sir; that is my signature.

Q. What number is that? A. This is the eighteenth load with 13 pieces.

Q. How many quarry cubes? A. 138 feet one inch.

Q. Actual? A. 125.77.

By Mr. HARLEY:

(627) Q. Now, Mr. Pirie, if you will just look at these carefully and be sure that they are right, and then tell us what they are, the number of stones, the quarry cube, and the actual measurement, we will get along much faster and we will be very grateful to you. Now, what is that? A. That is the 18th car load with thirteen pieces.

Q. Quarry cube? A. The quarry cube is 178.1.

Q. Now actual? A. The actual is 125 and 77/100.

Q. Now, if you have any doubt about any of them, just stop and say so. What is this? A. That is the 19th load with 37 stones.

Q. How many stones? A. 37.

Q. Now the quarry? A. 37 stones.

Q. And now the quarry cube, please? A. 463.9.

Q. Actual? A. 446 and 16/100.

Q. Now, this one, Mr. Pirie? A. This is the 22nd load.

The COURT: The last was the 19th.

The WITNESS: Yes.

Mr. HARLEY: Pardon me, your Honor, that should not be.

Mr. McLANAHAN: Nos. 20 and 21 are missing.

(628) Mr. HARLEY: Do you know how many stones they contained?

Mr. McLANAHAN: We have 12 stones in No. 20, the quarry cube is 396.1.

Mr. HARLEY: 11" I have.

Mr. McLANAHAN: Probably you are right.

Mr. McLANAHAN: The actual is 379 and 80/100. Now, No. 24 has 36 stones, 429.3, that is the quarry, and the actual is 427 and 71/100.

Q. (Mr. HARLEY) What is the number you have there? A. The number I have here is the 22nd load.

Q. How many stones? A. 34 pieces.

Q. 34? A. Yes.

Q. Quarry cube? A. The quarry cube is 445.5—wait a minute, there is something added to that making 452.11.

Q. The actual? A. 425 and 81/100.

Q. Now, this one, please, sir. A. It is the 23rd load with 22 pieces.

Q. 22 stones? A. 22 stones.

Q. Quarry cube? A. 315.11.

Q. Actual? A. 323 and 55/100.

(629) The COURT: Is it possible that the actual could be more than the quarry measurement?

The WITNESS: It appears to be so in this case.

Mr. McLANAHAN: It was so another case up above there.

The COURT: I did not know that it was possible.

The WITNESS: It appears to be in that case.

Mr. HARLEY: Now, this one, Mr. Pirie? A. This is the 24th carload with 25 pieces.

Q. Quarry cube? A. The quarry cube is 405.8, the net cube is 406 and 67/100. It is also more than the other for some reason or other.

Q. Now, this one? A. This is the 25th load with 19 pieces.

Q. Quarry cube? A. 25th car load with 19 stones.

Q. Quarry cube? A. 380.9.

Q. Actual? A. 403 and 56/100.

Q. Now, this one, please, sir? A. This is the 26th load with 31 stones; the quarry cube is 448.5.

Q. 448 ft. 5? A. Yes.

Q. Actual? A. 417 and 82/100.

Q. Now, this one, please, Mr. Pirie? A. This is the 27th load with 23 pieces.

(630) Q. 27th load with 23 stones? A. Yes.

Q. How many quarry cube? A. 477.4.

Q. Actual? A. 461 and 47/100.

Q. Now, this one, please, sir? A. This is the 28th load with 22 pieces.

Q. 28th load with 22 stones? A. Yes, sir.
Q. Quarry cube? A. 340.11.
Q. Actual? A. 301 and 8/100.
Q. Now, this one, please, sir? A. This is the 29th load with 35 pieces.
Q. 35 stones, quarry cube? A. Quarry cube is 506 feet.
Q. Actual? A. 410 and 62/100.
Q. This one, please? A. This is the 30th load with 21 pieces.
Q. 21 stones? A. Yes, sir.
Q. Quarry cube? A. 396.3.
Q. Actual? A. 371 and 81/100.
(631) Q. This one, please? A. This is the 31st load with 43 pieces.
Q. 43 stones, quarry cube? A. The quarry cube appears to be 515.5.
Q. The actual? A. 447 and 41/100.
Q. This one, please, sir? A. This is the 32nd load with 28 pieces.
Q. 28 stones? A. Yes, sir.
Q. Quarry cube? A. The quarry cube appears to be 429.5.
Q. Actual? A. 418 and 48/100.
Q. Now, this one, please, sir? A. This is 33 loads with 30 pieces.
Q. 30 stones? A. 30 stones.
Q. Quarry cube? A. 563 feet 8.
Q. Actual? A. 534 and 79/100.
Q. 534 and 79/10. This one, if you please, sir? A. 34th load with 33 stones.
Q. Quarry cube? A. 603 feet 5.
Q. Actual? A. 564 and 84/100.
(632) Q. If you please, sir? A. 35 load with 24 pieces.
Q. 24 stones? A. Yes.
Q. Quarry cube? A. 430.3.
Q. Actual? A. 424 and 89/100.
Q. This one, please, sir? A. The next one is No. 36 load with 31 pieces.
Q. 31 stones, quarry cube? A. 545.7.
Q. Actual? A. 545 and 28/100.

Mr. McLanahan: I have 595.

The Witness: 545 ft. 7 is the quarry cube.

Mr. Harley: I have 545.7. This one, please, sir? A. This is the 37th load with 27 pieces.

Q. 27 stones? A. Yes, sir.
Q. Quarry? A. 567 feet.
Q. Actual? A. 563 and 74/100.
Q. And this one? A. This is the 38th load with 34 pieces.
Q. Quarry? A. The quarry cube is 522 feet.
(633) Q. Actual? A. 517 and 25/100.
Q. This one, please, sir? A. The 39th load with 34 pieces.
Q. Quarry? A. 576.4.
Q. Actual? A. 548 and 97/100.

Mr. McLanahan: I have 581 as the quarry cube.

Mr. Harley: I have 576.4.

The Court: How about the actual?

The Witness: 576.4 is what I call the quarry cube.

Mr. McLanahan: There is a correction made on this.

Mr. Harley: Now, this seems to have been corrected. Mr. Pirie, look at the corrected part and see about that, that is the 39th one? A. Yes.
Q. How many stones? A. 34 stones on the car.
Q. Quarry? A. 581.4.
Q. Actual? A. 549 and 55/100.
Q. Now, this? A. 40th load with 30 stones.
Q. How many? A. 30 stones.
(634) Q. 30? A. Yes.
Q. Actual, I mean quarry? A. 610.6.
Q. Actual? A. 579 ft. and 65/100.
Q. Now, 41? A. This appears to be the 41st car load with 34 stones.
Q. Quarry? A. The quarry cube is 472.11.
Q. Quarry cube is what? A. 472 feet 11.
Q. I have 472 11½? Actual? A. 440 feet and 72/100. There is half here and 11½ is right for the quarry cube.
Q. Now, this one? A. 42nd load with 25 pieces.
Q. 42nd load, 25 stones, quarry cube? A. 377.9.
Q. Actual? A. 363 and 85/100.
Q. And this one? A. This is the 43rd load with 27 pieces.
Q. 43rd load and 27 stones? A. Yes, sir.
Q. Quarry? A. 419.7, I believe.
Q. Look at it closer—that is what I have.

Mr. McLanahan: That is what I have.

(635) The WITNESS: It is probably 5 or 7. I do not know which.

Mr. McLANAHAN: 7.

The WITNESS: I would call it 7.

Q. Now, the actual? A. 398 and 11/100.
Q. This one, please? A. This is the 44th load?
Q. How many stones? A. 34 pieces.
Q. Quarry? A. The quarry cube is 425.11.
Q. Actual? A. 387 and 61/100.
Q. Now, this one? A. This is the 45th load.
Q. How many stones? A. 29 stones.
Q. 29? A. Yes.
Q. Quarry cube? A. 463.3.
Q. Actual? A. 462 and 38/100.
Q. That one? A. This is the 46th load with 36 pieces.
Q. 36 stones? A. Yes, sir.
(636) Q. The quarry cube is how much? A. 405 ft. 5.
Q. Actual? A. 389 and 94/100.
Q. This, if you please? A. This is the 47th load with 35 pieces.
Q. 35 stones? A. Yes, sir.
Q. Quarry? A. 509 ft. 10.
Q. Actual? A. 486 and some fractions. I am not just able to state what they are.
Q. Let me see whether we can make it out. It is 86/100 or 96/100. Now, this one. A. This is the 48th load with 31 pieces.
Q. 48th? A. Yes.
Q. How many? A. 13 pieces.
Q. 13 stones? A. Yes, sir.
Q. Quarry cube? A. 214 ft. 6.
Q. Actual? A. 213 and 91/100.
Q. This one, please, sir? A. 49th load with 38 stones.
(637) Q. 38 stones, quarry? A. 574.3.
Q. Actual? A. 542 and 97/100.
Q. Now, this one, please? A. 50th load with 38 pieces.
Q. 38 stones? A. Yes.
Q. Quarry? A. 546.5½.
Q. Actual? A. 532 and 50/100.
Q. Now, that? A. This is the 51st load with 32 pieces.
Q. 32 stones? A. Yes.
Q. Quarry? A. 400 feet and 1".
Q. Actual? A. 361 and 76/100.
Q. This one, please, sir? A. 52nd load with 31 pieces.
Q. 31 stones? A. Yes, sir.
Q. Quarry? A. 112 feet 2.

Q. Actual? A. 378 feet and 4/100.

(638) Q. This one? A. This is the 53rd load with 38 pieces.

The COURT: Proceed.

Mr. HARLEY: What is the number of that?

The WITNESS: The 53rd load with 38 pieces.

Q. Quarry? A. 387 feet 8.
Q. Actual? A. 316 and 21/100.
Q. This one? A. This is the 54th load with 29 pieces.
Q. 54th load, 29 stones? A. 29 stones.
Q. Quarry? A. 321.3.
Q. Actual? A. 298 and 38/100.
Q. This one, please? A. This is the 55th load with 31 pieces.
Q. 55? A. Yes, 31 stones.
Q. Quarry? A. The quarry cube is 299 feet 10.
Q. Actual? A. 267 and 92/100.
Q. This one? A. This is the 56th load with 12 pieces.
Q. 12 stones? A. Yes.

(639) Q. Quarry? A. 388 feet 8.
Q. Actual? A. 355 and 93/100.
Q. This one? A. 57th load with 22 pieces.
Q. 57, 22 stones? A. Yes.
Q. Quarry? A. 619.2.
Q. Actual? A. 614 and 69/100.
Q. Now, this one? 58th load with 17 pieces.
Q. 17 stones? A. Yes.
Q. Quarry? A. 569.7.
Q. Actual? A. 538 and 30/100.
Q. This one? A. This is the 59th load with 10 stones.
Q. 10? A. 10 stones.
Q. Quarry? A. 183 feet 7.
Q. Actual? A. 162 and 57/100.

(640) Q. That one? A. This is the 60th load with 31 pieces.
Q. 31 stones? A. Yes.
Q. Quarry? A. The quarry cube is 364 feet 2.
Q. Actual? A. 324 and 51/100.
Q. This one? A. This is the 61st load with 22 pieces.
Q. 61, 22 stones? A. Yes.
Q. Quarry measurement? A. 504 feet 7.
Q. Actual? A. 486 and 30/100.
Q. This one? A. This is the 62nd load with 13 pieces.
Q. 13 stones, quarry? A. 505 feet 1.
Q. Actual? A. 488 and 57/100.

Q. That one? A. This is the 63rd load with 19 pieces.
Q. 19 stones, quarry? A. 570 feet 6.
Q. Actual? A. 548 and 53/100.
(611) Q. And this? A. This is the 64th load.
Q. How many stones? A. 23.
Q. Quarry measurement? A. 353.8.
Q. Actual? A. 324 and 7/100.
Q. This one, please? A. This is the 65th load.
Q. How many stones? A. 38 pieces.
Q. Quarry measurements? A. 398 feet 7½".
Q. Actual measurement? A. 335 feet and 9/100.
Q. Is it 1 or 9/100? A. It looks like 9 to me.

Mr. McLANAHAN: I have nine here.

Q. Now, this one? A. This is the 66th load with 18 stones.
Q. 66th, how many stones? A. 18.
Q. Quarry measurement? A. 529 feet 5.
Q. Actual? A. 507 feet and 60/100.
Q. And, if you please? A. This is the 67th load with 21
(612) pieces.
Q. 67, 21 stones? A. Yes, sir.
Q. Quarry? A. 307 feet 7.
Q. Actual? A. 285 and 31/100.
Q. This one, if you please sir? A. This is the 68th load.
Q. The number of stones? A. 33 stones.
Q. Quarry measurement? A. 371 feet 9.
Q. Actual? A. 346 and 96/100.
Q. Now, that one? A. This is the 69th load with 18 pieces.
Q. 18 stones? A. Yes, sir.
Q. Quarry measuremeat? A. 539 feet 6
Q. Actual? A. 533 and 21/100.

Mr. HARLEY: That makes 1,898 stones. Now, Mr. Pirie you added up those stones as 1,896. I make them 1,898. Now, adding 13 more which were cut in Mr. Graham's yard to which you testified, making 1,909, according to your calculation and 1,911 according to ours. The difference is not very material,
(613) and that makes in actual measurement, 27,407 and 66/100.

Mr. McLANAHAN: We have 27,408 and 12/100.

Mr. HARLEY: Then adding the 99½ feet, 13 stones, makes it 27,507 and a fraction.

Mr. McLANAHAN: That is the actual dimension, not the quarry cube dimension.

Mr. HARLEY: That is right, sir. I want to get the quarry cube out of this case. What his Honor said about its being impossible that the quarry cube should be less than the actual cube, is correct, isn't it?

A. I do not understand you.

Q. I say, what his Honor suggested that it is impossible—

The COURT: It seems to me so, Mr. Harley, but I do not know. I do not profess to know much about it.

Mr. HARLEY: It is axiomatic, your Honor.

Q. That is correct, that the quarry cube must necessarily be more than the actual measurement. A. It would necessarily be more than the actual measurement; it is nothing less than 12".

Q. This system of quarry measurement is something in use only at the quarry, is it not, by which you pay the quarrymen, isn't that the idea? A. It is also in use in the stone yard in receiving the stones. It is used there too.

Q. How is that? A. It is received by that measurement.

Q. Received by whom? A. It is received by that system (611) of measurement.

Q. It is frequently received by that system of measurement? A. Yes, sir.

Q. But it applies to the quarry system of measuring, does it not? A. It applies to the quarry, yes, sir.

Mr. HARLEY: If your Honor please, he made a mistake in running out the individual stone.

The COURT: I naturally would suppose that after considering the amount of cutting there would be a great deal of surplus stone hauled away.

Mr. HARLEY: That is not counted at all.

The COURT: It proves the quarry measurement is gross measurement and the cutting measurement is net measurement.

Mr. HARLEY: They do not use the quarry measurement. They ship the stone from the quarry to the stone yard and they take the figures on the stone.

The COURT: What I say is necessarily true, after a quantity of stone has been dressed at the building, there are a lot of shippings to be carried away.

Mr. HARLEY: That has nothing to do with the question, except that it makes us pay the freight on that surplus.

The COURT: Isn't that always true?

Mr. HARLEY: Yes, but none of that is counted.

Mr. McLANAHAN: The quarry cube does not take into account any dimension less than a foot. The same stone is shown on the setting plans. The finished stones are the ones that it is taken from.

Mr. HARLEY: In fact, it isn't taken from the stone at (615) all but from the drawing. 1,909 stones you make it all together and we make it 1,911 cut by Mr. Graham, and the actual cubic feet cut by Mr. Graham were 27,507 and 16/100, according to us, and you make it a few feet over that.

Mr. McLANAHAN: Yes.

Mr. HARLEY: Now, these (indicating) substantially agree with the summary which Mr. Piric has already put in. Now, all of these measurements were checked up by Mr. Freas, I believe, according to these invoices, Mr. Piric?

A. I do not know, sir, who they were checked up by; I did not do it.

Q. You do not know that Mr. Freas checked these up? A. I see Mr. Freas' handwriting on the invoices, but I did not see him do it. I was in Baltimore.

Q. You do not know how that was done? A. I do not know, sir.

Q. Now, Mr. Piric, take the book which you have placed in evidence as your book, marked Record of Contract No. 25, if you please, sir. You have already testified from that book. Now, in that book I find something about New Jersey red granite, has that anything to do with contract No. 25? A. No, sir; I stated when I put the book up that there was other work in the book except the Graham contract.

Q. Then the New Jersey red granite figures have nothing whatever to do with this contract. Now, Mr. Piric, commence right there at the beginning of that book, if you please, as I want to ask you a few questions. Are you right there at

the beginning now sir? A. Yes, I got the beginning of the (646) book.

Q. And you have marked on there all the stones that were cut by the Government and all the stones that were cut by Mr. Graham, is that correct? A. Yes.

Q. Now, this is column No. 1, isn't it? A. Yes.

Q. Now, it is very easy to tell from your record right there, how many stones on column 1 were cut by Mr. Graham. How many are there? A. 1 stone.

Mr. McLANAHAN: Let me get it clear about the columns. Is column No. 1 on the building or column No. 1 on the book, or column No. 1 on the drawing?

The WITNESS: Column No. 1 is a square base cut by Mr. Graham. It is not a column but we call it a column in here as it belongs to the column, it sets under the column.

Q. Is that the only one? A. Yes.

Q. How about this one? A. He did not cut that.

Q. He did not? A. He surely did not cut that. It seems to be a little black but it should be red.

Mr. McLANAHAN: If your Honor please, I would like to know whether that is the column, or what kind of a stone it is.

The WITNESS: It is a square base under the column. Of course, it belongs to that column, under the column.

(647) Q. (Mr. HARLEY) What is the next thing in the book after column No. 1? A. Well, after that column comes column No. 2.

Q. How many of those stones were cut by Mr. Graham? A. One square base.

Q. Now, the next thing there is column No. 3? A. Yes.

Q. How many stones in that column No. 3 were cut by Mr. Graham? A. 1 stone.

Mr. McLANAHAN: What is that stone?

The WITNESS: That is the column base.

Q. Square base? A. Yes, sir.

Q. Now, the next one? A. The next one is column 4, No. 1.

Q. How many did Mr. Graham cut in that, how many stones? A. He cut No. 1.

Q. The next one? A. A square base.

Q. The next one? A. Column 5, he cut one stone, the same stone as the other, the square base.

Q. The square base? A. Yes, sir.

Q. The next one? A. The next one is column 6.

Q. How many did he cut there? A. 1 stone, the 1st (648) stone.

Q. The next? A. Column 7, he done the same thing.

Q. They are all square bases? A. Yes, all square bases.

Q. Now, the next one? A. Column 8.

Q. How many did he cut there? A. He cut 1.

Q. He cut 1? A. Yes, sir.

Q. What is the next thing in the book? A. The next thing in the book is the A course.

Q. How many of those stones did Mr. Graham cut? A. Well, it would take me sometime to tell you that.

Q. I do not think it would. I think you have them all numbered right there. A. How many of the A stones did he cut?

Q. Yes. A. It may be that he cut all of them.

Q. Don't you know that he did cut all of them up to T? A. Yes, they are all black there and he must have cut all of those A stones.

Q. How many are there altogether? A. I do not know, sir; I haven't counted them.

Q. Haven't you numbered them? A. That is 45 or 46 having been added, but I would have to count them.

(649) Q. Aren't they already counted from 1 to 46 inclusive? A. There are some stones here and there and it would not come out that way.

Q. Let us get the number right. A. Those are right, there is no two that is cut—

Q. How many did he cut there? A. 46 stones.

Q. Mr. Graham cut 46 stones in course A which is the whole course. What is the next thing? A. B course.

Q. Did Mr. Graham cut all of that? A. Mr. Graham appears to have cut all of that.

Q. How many stones did he cut? A. There appears to be 42 stones here.

Q. Go over that carefully. A. That is 41½ here and with those changes figured in at the bottom, you see there is another one here (indicating).

Q. That makes two extra stones? A. Yes, sir, and that would be 42 and two would be 44, you see.

Q. 44 stones that Mr. Graham cut? A. Yes, sir.

Q. What is the next thing in the book? A. The next thing in the book is course C.

Q. C? A. Yes.

Q. How many of those did Mr. Graham cut? A. He cut (650) all of them. There would be 36 stones in that course; I do not see any half numbers.

Q. Let us be sure about that. See whether there are any half numbers. A. I do not see any.

Q. There are none there, are there? A. I do not see any.

Q. I don't. How many are there altogether? A. 36 stones.

Q. Cut by whom? A. Cut by Mr. Graham?

Q. Next? A. The next is course D.

Q. Who cut those? A. They appear to be all cut by Mr. Graham.

Q. Don't you know that according to that book they were all cut by Mr. Graham? A. I do.

Q. How many of them are there? A. There appears to be 40, if there isn't any half numbers.

Q. Be sure of that and tell us how many there are in the D course. A. 40 stones.

Q. All cut by Mr. Graham, were they not? A. Yes.

Q. Now, the next thing there? A The next is E.

(651) Q. E? A. Yes.

Q. Who cut the E course? A. Mr. Graham cut that E course.

Q. How many stones? A. There appears to be 36.

Q. Now, look carefully and see whether there are any more or any less. A. That appears to be the number.

Q. Don't you know that there are no half numbers there and that 36 are all? A. Yes.

Q. And they were cut by Mr. Graham? A. Yes.

Q. What is the next? A. The F course.

Q. By whom was that course cut? A. That course was cut by Mr. Graham.

Q. Of how many stones? A. 40 stones.

Q. 40 stones? A. Yes.

Q. All cut by Graham? A. Yes.

Q. Now the next course? A. The next course is the G course.

Q. G? A. Yes, sir, G.

Q. How many stones? A. The number of stones in the (652) course is 36.

Q. How many of them were cut by Mr. Graham? A. They were all cut by Mr. Graham.

Q. All cut by Mr. Graham? A. Yes, sir.

Q. All 36? A. Yes, sir.

Q. Now, the next course in that book is what? A. The next is H.

Q. H? A. Yes.

Q. How many stones? A. There is 42 stones in that course.

Q. 42? A. Yes.

Q. All cut by Mr. Graham, were they? A. Yes, all cut by Mr. Graham.

Q. Now, the next course in that book? A. The next in that book is Pier 1 and Pier 88.

Q. Let us take Pier No. 1, just as you have it there, so we may not slip anything. How many stones in Pier 1 were cut by Mr. Graham? A. 6 stones.

Q. That is, the whole pier was cut by Mr. Graham? A. He cut 6 stones in that pier.

Q. Aren't they all of the stones in the pier? A. No, sir, that is not all the stones in the pier.

Q. He cut six stones in that pier? A. Yes, sir.

(653) Q. Now, the next thing you have there? A. Pier 88.

Q. How many stones in that? A. 6 stones.

Q. Altogether 6 stones? A. Yes.

Q. Who cut those? A. Mr. Graham cut those.

Q. He cut the whole pier then, the 6 stones? A. Well, he cut 6 stones in the pier.

Q. But you do not know whether there are any other stones in that pier or not? A. Yes, I know there were more stones in that pier.

Q. The next course? A. The next course is I.

Q. How many stones are there in course I? A. 36 stones.

Q. Cut by whom? A. They were cut by Mr. Graham.

Q. They were all cut by Mr. Graham, weren't they? A. Yes.

Q. 36? A. Yes.

Q. Now, the next? A. The next is course J.

Q. J? A. Yes.

(654) Q. How many stones? A. 42 stones.

Q. 42 stones, cut by whom? A. Cut by Mr. Graham.

Q. The next course? A. The next course is K.

Q. How many stones? A. 38 stones.

Q. Cut by whom, please? A. By Mr. Graham.

Q. All of them were cut by Mr. Graham, were they not? A. Yes.

Q. Now, the next course in your book? A. Course L.

Q. L? A. Yes.

Q. How many stones in that course? A. There is 40 stones in that course.

Q. 40 stones cut by whom? A. Cut by Mr. Graham.

Q. All of course L cut by Mr. Graham? A. Yes.

Q. The next in your book? A. The next is course M.

Q. How many stones? A. There is 37 stones.

Q. By whom were they cut? A. They were cut by Mr. Graham.

Q. All of them cut by Mr. Graham? A. Yes.

(655) Q. The next in your book? A. Course N.

Q. How many stones? A. 41 stones.

Q. Cut by whom? A. They were cut by Mr. Graham.

Q. The next course? A. Course O.

Q. How many stones? A. 41.

Q. Cut by whom? A. Cut by Mr. Graham.

Q. All of them? A. Yes, sir.

Q. The next course in your book? A. Course P.

Q. How many stones? A. 43 stones.

Q. Cut by whom? A. They were cut by Mr. Graham.

Q. All 43 were cut by Mr. Graham? A. Yes.

Q. Now, the next course in your book, please? A. The next course in my book is course Q.

Q. How many? A. 39 stones.

(656) Q. Cut by whom? A. Cut by Mr. Graham.

Q. All of them? A. Yes.

Q. The next course in your book, please? A. Course R.

Q. How many stones? A. 47 stones.

Q. 47, cut by whom, please, sir? A. Cut by Mr. Graham.

Q. All of them cut by Mr. Graham, are they sir? A. Yes.

Q. The next course in your book? A. Is course S.

Q. Course S, how many stones? A. 38 stones.

Q. How many? A. 38.

Q. Look at that again. I think that is one of those where you have— A. 42. I looked in the wrong place.

Q. By whom were they cut, please? A. They were cut by Mr. Graham.

Q. All 42 cut by Mr. Graham? A. Yes, sir.

Q. Now, the next course? A. The next course is course T.

Q. How many in that course? A. It don't run very
(657) straight and it appears to be one missing there (indicating) you know.

Q. How many in all? A. There appears to be 36 stones in the course.

Q. I do not quite understand you? A. There appears to be 36 stones in the course.

Q. 36 stones? A. In the course, yes, sir.

Q. Now, how many of them were cut by Mr. Graham? A. There would be 34, this one and that one (indicating) were cut at the building.

Q. Weren't there two that he is not credited with here. See here, did you count these in the 34? A. I did not count them.

Q. Then out of the 36 Mr. Graham cut 34? A. He did.

Q. Mr. Graham cut 34 out of the 36? A. Yes.

Q. Now, the next course? A. The next course is course U.

Q. Course U, how many stones in that course, if you please sir? A. It would take me sometime to tell that.

Q. Well, now, that ought to be right plain. It is right there, isn't it? Let me change my question and ask you how many in that course did Mr. Graham cut?

Mr. McLanahan: Let's get at the whole course.

The Witness: That would not make it very much easier to tell just how many Mr. Graham cut. I make it 13 that (658) Mr. Graham cut in that course. I will try that again.

Q. I make it 14. A. You do, then I will try it again. 13 is what I got. The ones that are marked in black are the ones that Mr. Graham did. 1, 2, 3, 4, 5, 6 and 7 and one is 8 and one is 9, 11, 12, 13 and 14.

Q. Then 14 is correct? A. Wait until I see. 14 is correct.

Q. Now, the next course there? A. The next course is course V.

Q. Mr. Graham cut all of course V, did he not? A. He did.

Q. How many stones? A. 13 stones.

Q. Now, the next? A. The next is course W 1.

Q. How many stones in that course were cut by Mr. Graham? A. 7 stones.

Q. Can you say what the next after W 1 is? A. W 2.

Q. Mr. Graham cut all in that course, did he not, Mr. Pirie? A. Yes.

Q. How many stones? A. 4 stones.

Q. Now, the next course? A. W 3.

Q. Mr. Graham cut all in that course, did he not sir? (659) A. Yes, he cut all in that course.

Q. How many stones? A. There is 25 stones in that course.

Q. Now, the next course? A. The next course is W 4.

Q. How many in that course were cut by Mr. Graham, please sir? A. I got 7, is that right?

Q. 7, is right, isn't it? A. It is right if I have counted it right.

Q. Let's be sure, that is what I count from your book. A. 7, I make it.

Q. How is that? A. I make it 7.

Q. 7? A. Yes.

Q. Now, the next course? A. The next course is course X.

Q. How many are there in that course cut by Mr. Graham? A. 50 is what I call it.

Q. 50 is what I make it too.

Mr. McLANAHAN: Is that the total?

Mr. HARLEY: No, sir, it is stone cut by Mr. Graham.

Q. That was cut by Mr. Graham? A. Yes, sir.

Q. The next course? A. Course Y.

Q. How many of those are cut by Mr. Graham? A.
(660) 4.

Q. The next course? A. The next course is course Z.

Q. How many in that course were cut by Mr. Graham, please sir? A. 19.

Q. 19 cut by Mr. Graham? A. Yes, sir.

Q. Now, the next course? A. The next course is Z 1.

Q. All of that course was cut by Mr. Graham, was it not? A. Yes.

Q. How many stones, if you please? A. There is 25 stones in it.

Q. 25? A. Yes.

Q. Now, the next course, will you tell us, that is in your book? A. The next course is Z 2.

Q. Z 2. How many stones in that course were cut by Mr. Graham, if you please sir? A. 17.

Q. 17 cut by Mr. Graham? A. Yes.

Q. The next course in your book please? A. The next course is Z 3.

Q. Z 3, how many stones in that course? A. 23.

Q. 23 cut by Mr. Graham, or is that all in the course?
(661) A. 23 cut by Mr. Graham.

Q. I believe there are 23 in the course? A. Yes.

Q. All except No. 19 was cut by Mr. Graham? A. Yes.

Q. And 23 were cut by Mr. Graham in this course? A. Yes, sir.

Q. Now, the next course in your bookk, will you tell us sir? A. 20 stones.

Q. That whole course was cut by Mr. Graham, wasn't it? A. Yes, that was cut by Mr. Graham.

Q. How many A. 20 stones.

Q. The next? A. Z 5.

Q. That whole course was cut by Mr. Graham? A. Yes.

Q. How many stones? A. There is 60 stones.

Q. 60, the next course, tell us sir. A. Z 6.

Q. Z 6? A. Yes.

Q. Mr. Graham cut that whole course too, did he not, Mr. Pirie? A. Yes, he cut that course.

(662) Q. How many stones? A. 42.

Q. In Z 6, only 42? A. 54.

Q. Look over it and be sure that is correct now. A. 54.

Q. 54 in course Z 6 all cut by Mr. Graham, is that correct, sir? A. 54 stones all cut by Mr. Graham, yes, sir.

Q. Now, the next course, if you please, Mr. Pirie? A. Z 7.

Q. That whole course was cut by Mr. Graham too, was it not? A. No, sir, I find one stone, at least, that was not cut by Mr. Graham. That stone was cut at the building.

Q. What is that? A. That stone was cut at the building.

Q. How many are in that course? A. There is 60 stones in the course and there was apparently 59 of them cut by Mr. Graham.

Q. All but 1? A. Yes.

Q. What was the number of the one he didn't cut? A. Z 7 No. 4.

Q. No. 4 A. Yes.

Q. Now, the next course, if you please, sir? A. The next course is Z 8.

(663) Q. How many stones are in that course? A. 44.

Q. I made it 45, do you think 44 is correct? A. Well, I might count it again. You see that there is a chance that I might make a mistake. There is the color of ink to be taken into consideration. 45.

Q. How many, sir? A. 45, I make it.

Q. 45 in Z 8 cut by Mr. Graham? A. Yes.

Q. The next course? A. Is Z 9.

Q. How many in that course was cut by Mr. Graham? A. 31, is that right?

Q. 31 in Z 9 cut by Mr. Graham? A. Yes.

Q. Now, the next course? A. The next course is Z 10.

Q. How many in that course was cut by Mr. Graham, please sir? A. I make it 23.

Q. Z 10, 23? A. That is what I get.

Q. I made it 24. I may be wrong? A. Just watch me while I count, 24 I get.

Q. How many, sir? A. 24, I get.

Q. You do not guess that, you know 24 is right, do you

(664) not? A. 24 I get.

Q. How is that? A. I get 24.

Q. Thank you, sir, very much. Now, the next course please. It will be very simple now, in a moment? A. Z 11.

Q. How many of those are cut by Mr. Graham? A. 23.

Q. 23 of those are cut by Mr. Graham? A. Yes.

Q. Now, the next course? A. Z 12.

Q. How many of those are cut by Mr. Graham. There are only 6 in that course, are there not? A. 4.

Q. 4 cut by Mr. Graham in that course? A. Yes.

Q. 4 out of 6? A. Yes.

Q. The whole course was 6, was it? A. Yes.

Q. 4 cut by Mr. Graham? A. Yes.

Q. The next? A. Z 13.

Q. That is another 6 stone course? A. Yes, sir.

Q. How many of those 6 were cut by Mr. Graham? A. (665) It appears to be 4 out of 6.

Q. 4? Q. Yes.

Q. Now, the next? A. Z 14.

Q. That is another 6 stone course, isn't it? A. Yes.

Q. How many cut by Mr. Graham? A. 5.

Q. Next? A. Z 15.

Q. That is another 6 stone course, is it not? A. Yes.

Q. How many cut by Mr. Graham? A. 6.

Q. All of them? A. Yes.

Q. 6? A. Yes.

Q. The next, please? A. Z 16.

Q. Is that a 5 or 6 stone course? A. 5 stone course.

Q. How many cut by Mr. Graham? A. 3.

Q. 3? A. Yes.

Q. Next? A. Z 17.

Q. How many in that course? A. It appears to be 2 in (666) that course.

Q. Who cut those two? A. Mr. Graham.

Q. Next? A. Z 18.

Q. Any there cut by Mr. Graham? A. Not any.

Q. Now, the next course? A. Z 19.

Q. Any there cut by Mr. Graham? A. Not any.

Q. The next course? A. Z 21.

Q. Any of those cut by Mr. Graham? A. Not any.

Q. Next? A. Z 20.

Q. How many of those cut by Mr. Graham? A. There appears to be 4 stones cut by Mr. Graham there.

Q. 4 stones cut by Mr. Graham out of 8 in the course, isn't that correct? A. No, sir, there aren't there—well, there appears to have been 8 numbers put down but there doesn't appear to be any stone for any more than 4.

Q. And 4 were cut by Mr. Graham? A. 4 of them were (667) cut by Mr. Graham and the balance was never cut, I think.

Q. I beg your pardon. A. The balance wasn't cut.

Q. Now, the next? A. Is Z 12.

Q. You mean E P Z 12? A. Yes.

Q. How many of those were cut by Mr. Graham? A. There appears to be 5.

Q. 5 cut by Mr. Graham out of 8 were there not? A. Yes.

Q. Now, the next course there? A. E P Z 13.

Q. That whole course was cut by Mr. Graham, wasn't it? A. Yes, there is 6 stones in it cut by Mr. Graham.

Q. 6 stones, the whole course? A. Yes, sir.

Q. What next? A. E P Z 14.

Q. How many of those were cut by Mr. Graham? A. There appears to be 4.

Q. 4 out of how many? A. 4 out of 8.

Q. Next? A. Z 15.

Q. Z 15? A. E P Z 15.

Q. How many of those did Mr. Graham cut? A. He cut (668) 4 out of 7.

Q. 4 out of 7? A. Yes.

Q. Next? A. E P Z 16.

Q. How many of those did Mr. Graham cut? A. He cut 3 out of 4.

Q. 3 out of 4? A. Yes.

Q. Next? A. E P Z 17.

Q. How many of those did Mr. Graham cut? A. He cut 3.

Q. That was all of it, wasn't it? A. Yes.

Q. Now, the next? A. Is a dentil course.

Q. Any of those cut by Mr. Graham? A. No, sir.

Q. The next? A. E P Z 19.

Q. Any of those cut by Mr. Graham? A. Not any.

Q. The next? A. The next is E P Z 21.

Q. Any of those cut by Mr. Graham? A. No, sir.

Q. The next? A. The next is Coping for Z 20.

Q. How many cut by Mr. Graham? A. He appears to (669) have cut 5 out of 8.

Q. 5 out of 8 cut by Mr. Graham? A. Yes.

Q. The next? A. N. P. Z 12.

Q. How many cut by Mr. Graham? A. There appears to be 5.

Q. 5 out of 8, isn't it? A. Yes.

Q. Cut by Mr. Graham? A. Yes.

Q. Now, the next? A. N. P. Z 13.

Q. How many of those cut by Mr. Graham? A. The 6 stones were all cut by Mr. Graham.

Q. The whole course, consisting of 6 stones, was cut by Mr. Graham? A. Yes, sir.

Q. The next? A. N P Z 14.

Q. How many were there cut by Mr. Graham? A. 3 stones out of 8.

Q. Next? A. N P Z 15.

Q. How many were there cut by Mr. Graham? A. 1 (670) out of 7.

Q. Next? A. N P Z 16.

Q. How many cut by Mr. Graham? A. All cut by Mr. Graham.

Q. How many? A. 4 in all.

Q. 4, that is the whole course, cut by Mr. Graham? A. Yes.

Q. Next? A. N P Z 17.

Q. How many of those cut by Mr. Graham? A. There were 3 cut by Mr. Graham.

Q. That was the whole course, wasn't it? A. Yes.

Q. Next? A. The next is a dentil course.

Q. What is it? A. N P Z 18.

Q. Any of those cut by Mr. Graham? A. No, sir.

Q. Next? A. The next is N P Z 19.

Q. How many of those cut by Mr. Graham? A. 5 stones out of 13.

Q. 5 stones out of 13 stones were cut by Mr. Graham on that course? A. Yes.

Q. What is the next? A. The next is N P Z No. 21.

(671) Q. Can you tell us how many of those stones were cut by Mr. Graham, if any? A. Not any.

Q. Next? A. N P Z.

Q. N P Z 20, isn't it? A. I think it is.

Q. You think it is? A. Yes.

Q. Isn't that correct? A. Yes.

Q. How many of those stones were cut by Mr. Graham, if any? A. 6 out of 8 he cut.

Q. 6 out of 8 were cut by Mr. Graham? A. Yes.

Q. The next? A. W P Z 12.

Q. How many of those did he cut? A. He appears to have cut 6 out of 8.

Q. Next? A. N P Z 13.

Q. How many of those were cut by Mr. Graham? A. 5 out of 6.

Q. Mr. Pirie, we were down to the W P Z No. 14 course, I believe. How many are in the course, please, sir? A. 8 stones, sir.

Q. How many were cut by Mr. Graham? A. Four.

(672) Q. Next? A. W P Z No. 15.

Q. How many stones in all? A. 7 stones.

Q. How many were cut by Mr. Graham? A. 1-2-3-4-5— there appears to be 5.

Q. Next? A. W P Z No. 16.

Q. How many stones in that course? A. 4 stones.

Q. All cut by Mr. Graham, were they not? A. Yes, sir.

Q. The next course? A. W P Z No. 17.

Q. How many in that course? A. 3 stones.

Q. All cut by Mr. Graham, were they not? A. Yes, sir.

Q. What is the next? A. This course here.

Q. And thirteen in that course? A. Yes, sir.

Q. This course here (indicating), No. 18, there were none cut by Mr. Graham in this course? A. None cut by Mr. Graham.

Q. What is the next? A. W P Z No. 19.

Q. Thirteen there and none cut by Mr. Graham? A. (673) 13 and none cut by Mr. Graham.

Q. What is the next? A. W P Z No. 21.

Q. Any of these cut by Mr. Graham? A. Not any, sir.

Q. Fifteen in that course, I believe? A. Yes, sir.

Q. Next? A. W P Z No. 20.

Q. How many in that course? A. There appears to be 8 stones.

Q. How many cut by Mr. Graham? A. 1-2-3-4-5-6— 6 stones cut by Mr. Graham.

Q. Next? A. The next is P Z.

Q. How many cut by Mr. Graham, please? A. There appears to be one stone cut by Mr. Graham.

Q. Next? A. Parapet between pediment is the next.

Q. What letter? A. Letter N.

Q. Any cut by Mr. Graham there? A. None cut by Mr. Graham.

Q. How many in all in that course? A. They are the parapets between pediments and there appears to be 22 stones altogether in that, and out of the 22 Mr. Graham cut 1.

Q. How many stones were in parapet N? A. In parapet (674) N there is 1-2-3-4-5-6— there are 6 stones and none were cut by Mr. Graham.

Q. You made the 22 by combining that course with the previous course of which you had already testified? A. Yes, sir.

Q. And what is the next? A. The next is dome ashlar.

Q. You have it down there as D A? A. Yes, sir; I have it here as D A.

Q. How many were cut by Mr. Graham? A. There appears to be 14 here, but that is not just exactly correct. Some of them were moved elsewhere about the building and then we put a stone that was a little different—

Q. Well, how many are there which were cut by Mr. Graham, please? A. There appears to be 14 marked up here as cut by Mr. Graham.

Q. And 15 in all in that course? A. Well, there are 2 here which were were split at the building, and that would make 16 stones in all.

Q. What is the next? A. The next is the D B course.

Q. How many of those were cut by Mr. Graham? A. I make 15 cut by Mr. Graham.

Q. How many? A. 15 I make.

Q. The next? A. The next is D C.

(675) Q. How many were cut by Mr. Graham? A. 17.

Q. 17 cut by Mr. Graham? A. I think so.

Q. In D B you make 17 A. No, D. C.

Q. In D. C you make 17? A. Yes, sir; 17; there is a stone here that appears to be cut twice.

Q. Now, in D C you say there were 17 cut by Mr. Graham? A. Yes, sir; there are 2 more stones that I find were cut at the building; there was something the matter with them and they were cut at the building.

Q. How many D C's were cut by Mr. Graham? A. I make it 15. I find there are two here as I said that Mr. Graham cut and they were cut over again by the Government.

Q. Then there are 15 D C's cut by Mr. Graham? A. Yes, sir.

Q. What is the next? A. D D.

Q. All of those were cut by Mr. Graham, were they not? A. They appear to be all cut by Mr. Graham.

Q. How many of them? A. 33.

Q. Next? A. D E.

Q. How many of those were cut by Mr. Graham? A. 39.

(676) I think.

Q. Now, the next? A. The next is D F.

Q. Well, all of those were cut by Mr. Graham except two, were they not? A. Except two, they were all cut by Mr. Graham.

Q. How many does that make that were cut by Mr. Graham in D F? A. 45.

Q. I counted 46 from your book, I thought? A. Well, I will try it again. Yes, 46, I make it.

Q. Now, the next, please? A. D G.

Q. All cut by Mr. Graham except two, were they not? A. All cut by Mr. Graham except two, and there appears to be 48 stones in the course.

Q. Then Mr. Graham cut 46 in that course? A. I think that would be correct.

Q. Now, the next A. The next is D H.

Q. How many in that course cut by Mr. Graham? A. 20.

Q. And the next? A. The next is D I.

Q. How many cut by Mr. Graham in D I? A. I make 38.

Q. What is the next? A. D J.

Q. That is 48 in all and none of those were cut by Mr.
(677) Graham. That is correct, is it not? A. Yes; that is correct.

Q. And the next? A. D K.

Q. How many were cut by Mr. Graham in D K? A. There appears to be 8.

Q. And the next? A. D L.

Q. How many were cut by Mr. Graham in D L. A. 5 I make it.

Q. And in the next? A. The next is D M.

Q. How many were cut by Mr. Graham there? A. 1 stone, I think.

Q. And the next? A. D N.

Q. 49 in that course and none cut by Mr. Graham according to your books, I believe, is that correct? A. That is correct.

Q. And the next? A. D O.

Q. How many of those were cut by Mr. Graham? A. 3, I make it.

Q. And the next? A. D F.

Q. There were 48 in that course and none of them were cut by Mr. Graham, I believe; is that correct according to
(678) your book? A. That appears to be correct.

Q. Next? A. D Q.

Q. That is 48 in all and none were cut by Mr. Graham according to your book, I believe; is that correct? A. Yes, sir; that is correct.

Q. Now, the next? A. The ceiling stones of the portico.

Q. None of those were cut by Mr. Graham, is that correct? A. That is correct.

Q. What else? A. That is all of Mr. Graham's contract that is in this book. This does not belong to it at all (indicating).

Q. That is all of Mr. Graham's contract which is in the book? A. Yes, sir; that is all that is in the book. There is some that is not in the book.

Q. You found that out over night? A. Oh, no, I always knew that.

Q. You always knew it? A. Yes, sir.

Q. Did you put it all in the book? A. No, sir; I did not put it all in the book.

Q. How many stones are there that you did not put in that book? A. I could not exactly tell that.

Mr. HARLEY: As a matter of fact, this witness has testified that there were 1,754 stones, and the witness has already

(679) testified that he checked off 1,909 stones, making a difference, I believe, of 155 stones.

The WITNESS: That is not in the book.

Q. How did you know that? A. I always knew it.

Q. Well, at page 744 of the record how is it that when the gentleman asked you, referring to that book "does that include all the stones in pavilion C or part C" your answer was "Yes, sir; it includes all the stone in part C which was known as the Graham contract?" Explain that, please? A. Well, when the 90 stones were sent to the quarry that was not convenient to put in the book at that time and I made them on special schedules which can be produced if necessary, and later on I did not have the time to put them in the book and I simply left them on a separate piece of paper. They are on separate papers for that reason.

Q. What did you mean then by stating to the jury on page 743, in answer to the counsel's question: "I believe they are, because the book and the invoices compared"? A. It is very easy to see that the book and the summary do not agree. The balance of the work happens to be on other paper instead of being in the book. The book is ruled here for it, but I did not have the time to put that in and I never did put it in. I can produce the schedules of that, though.

Q. But when you told the gentlemen yesterday that that book included all of pavilion C, you made a mistake, didn't you? A. I did not make a mistake, I probably forgot that for a time. I had not seen that book for a whole year. The (680) book was here Saturday and it was taken home by you. I have the schedule here and I can produce it.

Q. Well, I took the book home and I ascertained that you did not have on that book all the stones which you swore were in pavilion C. Is not that correct, sir? A. I don't think it is.

The COURT: I cannot see why you emphasize that of being of such supreme importance.

Mr. HARLEY: I consider it very important, if your Honor please, and I except to the remark of the court. I will show the importance of it. I hope I am not tedious.

To the addressing by the court to counsel for the defendants in the presence of the jury, the following language: "I cannot see why you emphasize that of being of such supreme importance," the defendants and each of them then and there

excepted and prayed the court to sign and seal this their twenty-fifth bill of exceptions which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Twenty-sixth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exception, all of which are hereby incorporated in and made a part of this their twenty-sixth bill of exceptions at the trial of this case immediately after the matters and things set forth in the defendants' twenty-fifth bill of exceptions, the
(681) court said to counsel for the defendants: "I think you are rather violent with the witness and I cannot see that it is of such supreme importance." To which action of the court in making said remarks to the counsel for the defendants in the presence of the jury, the defendants and each of them then and there excepted and prayed the court to sign and seal this their twenty-sixth bill of exception which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Twenty seventh Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions all of which are hereby incorporated in and made a part of this, their twenty-seventh bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

By Mr. HARLEY UNDER CROSS-EXAMINATION.

Q. Now, on page 913 I say: "Q. And you have marked on there all the stones that were cut by the Government and also all the stones that were cut by Mr. Graham, is that correct?" and you say: "Yes." Is that correct, inasmuch as we have discovered a shortage of more than 155 stones? A. I testified to that, but the stones did not all happen to be in that book. The stones did not happen to be in the book, but they are on separate papers. They are not held back for any reason at all, but they did not happen to be in that book.

Q. Are you sure that you have not given the Government
(682) credit for them?

The WITNESS: Sir?

Mr. HARLEY: I say, are you sure that you have not given the Government credit for them?

A. I am quite sure I have not given the Government credit for them, because my schedules to Mr. Green's office will prove that.

Q. You were asked to bring into court your calculations; on page 777 you testified that you made calculations before the contract was awarded, and you were then asked to bring in your calculations. This (indicating) is what you brought in, I believe? A. Yes, sir.

Q. Is that your handwriting at the top? A. Yes, sir; that is all my handwriting.

Q. It is all in your writing? A. Yes, sir.

Q. Have you the calculations which you made? A. I have not; they represent quite a number of different sheets and that seems to be only a copy of the summary.

Q. Look at the second item, do you mean to say that the eight column bases figured out exactly that number of feet (indicating)? A. No, sir; I mean to say that was figured from the scale drawing and it was as near as I could make it from the scale drawings. I do not say that it is correct now.

Q. You did not take the figures on the drawings, then? A. No, sir; I took the schedule. It was only an estimate.

(683) Q. This was an estimate and not a calculation? A. It was an estimate or a calculation, just as you wish to put it.

Q. You have headed it "Estimate" and you have made it come out at 61,128 cubic feet 6 inches. I ask you now whether that is accurate or whether it is a mere estimate? A. It is an estimate, in my opinion, of the stone that was in the job.

Q. And you do not claim for it accuracy? A. No, sir; I do not claim accuracy for it.

Q. (The COURT) This estimate was made up, as I understand it, before the contract? A. Before the contract was given out, it was made up from these drawings, using the scale, which is customary in estimating a job.

Q. For whose information was it made? A. It was made up for the information of the office in Washington, D. C.

Q. (Mr. HARLEY) Now, look at setting plan No. 1, which was approved, I believe, on December 21, by Mr. Green. This represents A, B and C courses, doesn't it? A. Yes, sir.

Q. Now, look on your book and see when the stone for the A course was delivered to Mr. Graham, that is on page 6 of your book, if you please?

Mr. McLANAHAN: We do not want the jury to understand that there was any delivery by us to Mr. Graham in Baltimore whatever, and we object to the question.

(681) Q. (Mr. HARLEY) I will use his language here: Tell us when it was received at Mr. Graham's yard?

Mr. McLANAHAN: We have no objection to that.

Mr. HARLEY: Mr. Pirie, just look at the A course on page 6 (indicating), is that right?

The WITNESS: Yes, sir.

Q. Now, this shows that the setting plan was approved December 21, 1906. I want you to tell the jury when the first stone was received there? A. The first stone was received on July second, 1907.

Q. Look at page 8 and tell the gentlemen of the jury when the last stone was received there in A course? A. It was received May 24.

Mr. HARLEY: I mean the latest stone.

The WITNESS: I did not understand you that way.

Q. What is that? A. That is July 18, 1907.

Q. Now take B course on page 9: When was the first one received by Mr. Graham? A. July 2, 1907.

Q. When was it shipped to Washington by Mr. Graham? A. July 15, 1907.

Q. Look at page 10, and see when the latest stone in course B was received. Is that it (indicating)? A. Yes, sir; that is it.

Q. What is the date? A. September 5, 1907.

Q. This was approved December 21, and it was delivered (685) September 5, 1907; that is more than 8 months; let us take C course, what is the first one there? A. July 12.

Q. July 12, 1907; now, the latest one in that course; is this it (indicating)? Anyhow, there is one there which was received by Mr. Graham on August 14, 1907; is that right? A. Yes, sir.

Q. That is nearly eight months after December 21. Now, look at the I course on page 27. Tell the gentlemen of the jury when the first for I was received? A. September 23, 1907.

Q. Look and see when the latest one was received, see if there is not one there received October 4, 1907? A. There appears to be two recived on October 4, 1907.

Q. And that stone was received October 4, 1907? Now, look at J, page 29, what was the date of the first stone? A. September 5, 1907.

Q. When was it shipped to Washington by Mr. Graham? A. September 13.

Q. Now, which was the last one received, is not that it (indicating)? A. Yes, October 4.

Q. There is one there of October 4? A. Yes, sir.

Mr. McLANAHAN: Which course is this?

Mr. HARLEY: This is J course, sir.

The WITNESS: There were two stones received on October 4.

Q. It was approved January 22, and received October (686) 4. Now, look at M, page 37; when was the last one received there, are there any after November 19, 1907? Here is the first one (indicating)? A. No, this is the first here (indicating).

Q. The one at the top was October 10, 1907? A. Yes, sir.

Q. No. 35 was received when? Q. November 19.

Q. And that is exactly ten months after January 22, the date of the approval of the setting plans. Now, Mr. Pirie, looking at your resume of the amount of stone received, I believe you testified that up to the first of October, 1907, there had been received at Graham's yard 10,983 cubic feet, do you remember about that? Are you aware of the fact that up to January 22, Mr. Green had approved plans representing nearly 13,000 actual cubic feet? A. I am not aware of that. I do not know that. I had nothing to do with that.

Mr. HARLEY: I say now you have already testified that up to October 4, but 10,983 cubic feet, according to quarry measurement, had been received at Graham's yard? A. If that was on there it would be correct in my opinion. If the typewriter did not make some slip or something, then it is all right. I made this up at one time and it was copied, and of course I believe it is right, but I have not compared it with the other one. The other might be a fraction out of the way too.

Q. Now, look at this (indicating). Up to October, what (687) does this show? A. That appears to be 10,983 feet and 11 inches.

Q. Is that right? A. Yes, sir.

Q. That is the original paper you spoke of? A. Yes, sir.

Q. It shows that there had been received at Graham's yard in Baltimore less than 11,000 cubic feet according to the

quarry cube measurement? A. Yes, sir; that is what had been received.

Q. Did Mr. Graham complain to you of delay in delivery? A. I do not just know that he did complain. I don't think that at that time he had very much occasion to complain. He may have done it previous to that time; along about that time Mr. Graham, I think, was getting as much as he could handle.

Q. Along about what time, October? A. About August or September.

Q. Did he get during June as much as he could handle? A. I don't just know that he did.

Q. Did he get during May as much as he could handle? A. I don't think so.

Q. Did he get during April as much as he could handle? A. I don't think he did.

Q. Don't you know that during the entire summer he did not get as much as he could handle? A. Not the entire summer. I don't know.

Q. (Mr. HARLEY) Now, look at your list which you made (688) out and state to the court and jury whether as a matter of fact he had enough to keep him going in April. A. The list shows that he received no stone at all in April.

Q. Didn't he have enough to keep him going in March? A. It shows he did not receive any in March.

Q. (Mr. HARLEY) Did he have enough to keep him going during the month of May? A. He had enough to keep the force that he had going in May.

Q. Do you mean to say that he could not have gotten a larger force? A. I do not mean to say that he could not have gotten a larger force.

Q. Don't you know that he was anxious to get a larger force? A. No, sir; I don't know that.

A. Don't you know that the reason why he did not get a larger force was the fact that he did not have the stone? Is not that true? A. Yes, sir; I suppose that is true. If he had more stone he would have gotten more men, but he had enough stone for the men that he had there.

Q. Now, you have stated at page 780 that Mr. Graham was not piled up in a heap, but that the piling up was done gradually. Look at this list which you have before you and state how many quarry cubes were received at Mr. Graham's yard in November? A. 6,202 feet, 1½ inches.

(689) Q. How many in December? A. 8,337.4.

Q. How many in January? A. 5,357 feet 7 inches.

Q. How much does that make altogether—9,899 cubic feet and a fraction, is it not? A. I did not have it added there.

Q. And yet up to October 1, there had been received less than 14,000?

Q. (Mr. HARLEY) On page 721 of the record you stated that 165 cars were received at Graham's yard. Do you mean to say that 165 cars were unloaded there? A. I think that was what I meant to say.

Q. When the stone was taken away from Graham's yard, as a matter of fact, were there not several unloaded cars on the track?

The WITNESS: I do not understand that, please say that again.

Mr. HARLEY: Read it to him, Mr. Weinberg, please, sir.

(The stenographer read the question referred to.)

A. There was quite a number.

Q. A number of them—well, as a matter of fact, weren't those several cars embraced in the 165 which you have referred to?

The WITNESS: The ones that were out on the track?

Mr. HARLEY: Yes.

The WITNESS: Were they in the 165?

Mr. HARLEY: Yes.

A. I did not count them that were in the track at all. (689½) Q. You did not count them at all? A. No, sir.

Q. Then the 165 invoices were of stone actually received and unloaded in Mr. Graham's yard? A. Yes, sir; there are memorandums of that here somewhere.

(It is hereby agreed that the original memoranda here referred to may be used in any court at the hearing or in argument in this case.)

Mr. HARLEY: Will you let us have those papers, gentlemen?

Mr. McLANAHAN: Here they are.

Q. (Mr. HARLEY) Now, Mr. Pirie, there (indicating) are the memorandums. Show us where that is? A. This one which

I hold in my hand is the 165 load, and my impression is that was the last load.

Q. Was that unloaded in Mr. Graham's yard, please, sir? A. Yes, sir; there would have been unloaded or I would not have signed it.

Q. It was, as a matter of fact, unloaded in Mr. Graham's yard? A. Yes, sir.

Q. Now, you have testified to something about the winter work. It is very much more difficult to do this work in the winter than at any other season, is it not?

Mr. HILL: I object, unless you tell us what you mean by this work.

Q. Mr. HARLEY: Put it that it is very much more difficult to do stone cutting, is not that true?

(690) Q. I want to know whether or not it is more difficult to do stone cutting work in Baltimore or Washington in the winter time than it is at any other season? A. It depends on the weather. If the weather is good a man will cut more stone in the winter than in the summer.

Q. If the weather is good a man will cut more stone in the winter than in the summer? A. Yes, sir; if the weather is good, but if it is bad, he would not.

Q. Can you account for the fact, then, that in December, 1908, under your supervision in Washington, you were able to cut but 1,761 quarry cube feet? A. Yes, sir.

Q. Then, tell the jury why. A. I will state that in that month we were working on these columns (indicating) which were fluted, and we would take them up perhaps the month before that and that would not show that we had done anything at all on them except the ones that were finished. If we took that stone up in November it would not be finished in December because the amount of work on the stone, cutting it all around first and fluting it afterward. And then we were also cutting these stones in the ceiling that month and sometimes it would be the following month or the month after that before we got them done, and that is why we did not cut any more stones than that in the particular month the gentleman refers to.

Q. (The COURT) And they would be credited as work done in the month in which they were finished? A. Yes, sir;
(691) they would be credited on the month they were finished and they would not show anything for the first month or the two months before.

Q. (Mr. HARLEY) Can you account for the fact that in the month of February, then, under your supervision, you were able to cut only 2,316 stones?

Mr. McLANAHAN: February, 1909?

Mr. HARLEY: Yes, sir, 1909.

A. The work was nearly finished by that time and half of the men were gone.

Q. The work was nearly finished? A. Yes, sir.

Q. And about half of the men were gone? A. Yes, sir.

Q. How was it then, that in January you were able to cut only 3,102? A. Well, for the same reason, we would be working on those large stones (indicating) which of course would not appear finished in that month.

Q. What month would they be credited for? A. Whatever month they were finished in.

Q. Were they finished in February? A. I cannot say; what stone are you referring to?

Q. Well, you did not cut any after March? A. No, sir.

Q. So what you cut in January and February was counted up later on, is that right?

Mr. HALE: You can use these schedules which were made (692) by the witness (indicating).

(It is hereby agreed that the original schedules here referred to may be used in any court at the hearing or in argument in this case.)

A. I cannot tell you exactly what we did each and every month with that crowd of men. The schedules will show that, and the summary will show what we did during the month.

Q. I am asking you to explain to the jury the small quantity of work which you did each and every winter month. I am asking you to take these schedules which are before you and show us which winter month was a large month? A. I am telling you that we were working on these large stones and they would be under the hammer from two to three months, some of them.

Q. So, as a matter of fact, in no winter month did you do a half's month work there? A. Well, it was not on account of the weather.

Q. What was it on account of? A. It was on account of the amount of work on those stones.

Q. It was a small amount done in the winter time because it was difficult cutting? A. In my opinion we could not have done more in the summer—

The WITNESS: I will state here that Mr. Green furnished the contractor with lumber to close up and board up the backs of these sheds so that the men could and did work. He furnished them with cuttings of wood to make themselves little fires to keep warm, if it was cold, and they did work, but the work they were doing was on these large stones, which were not (693) only cut and fluted as shown there, but it took two or three months to cut them, and that is the reason the stones were not finished as quickly as when we did the plainer work such as Mr. Graham cut.

Q. That is the reason? A. Yes, sir.

Q. Look at the list which I believe is copied from your book and see if that is not right? You have a list of the stones cut by the Government on page 198? A. Yes, sir, I have it here.

Q. Now, let's see how many stones were cut by the Government? A. 1,117.

Q. What is that down there (indicating)? A. That is part of it.

Q. That is as against 1,911 cut by Mr. Graham. Now, Mr. Witness, do you know or can you furnish us with the list of the stones omitted from that book?

The WITNESS: A list of the stones cut by the Government?

Mr. HARLEY: No, cut by Mr. Graham.

The COURT: That are not on that book?

Mr. HARLEY: Yes, sir.

A. The invoices will show that.

Q. But I say can you furnish us with a list of the one hundred and fifty odd stones for which you failed to give us credit on this book?

The WITNESS: I can give them to you as I received them.

Q. Can you give me a list of the missing stones? A. Yes, sir; I have them on separate pieces of paper. I haven't (694) got them here.

Q. When can you get that? A. Well, I might get it by looking it up; they are on sheets like that (indicating.)

Q. Let us have it as soon as you can find it, either this evening or tomorrow morning. Now, you have stated that more cuttings were on the larger stones, have you not, sir? A. Yes, sir; I stated that.

Q. More cutting was on the larger stones? A. Yes, sir.

Q. Yet other things being equal, is there not more cutting on stones that are divided into smaller parts? Do you understand that? A. No, sir; I do not.

Q. Well, let us say that this (indicating) represents the face of a stone, say a large dimension?

The WITNESS: Yes, sir.

Q. You notice that I have cut it there into four parts? A. Yes, sir.

Q. Now, other things being equal, that is taking the stone of the same grade, upon which would there be more cutting, upon that stone as a whole, or as divided into four parts? A. There would be more work in cutting it into four parts than one part.

Q. Because there was those additional surfaces to cut? A. Yes, sir.

Q. So, other things being equal, the smaller stones have (6955) the greater amount of work? A. Yes, if the other stones were all cut with plain bonds and joints like that, and the other stones cut all around were not only cut but they were carved on the edges, on the bottom and on three sides.

Q. Now, Mr. Pirie, is the fret work expensive? A. Well, it is fairly expensive.

Q. Expensive work, is it not? A. It costs more than plain work.

Q. Look on your book at pag. 93 and tell us how much fret work was done by Mr. Graham and how much was done by the Government? A. There appears to be a memorandum on the book here which states that the fret work by Graham was 959.7 and 199.7 of that fret was cut at the building.

Q. That means cut by the Government? A. Yes, sir.

Q. Who, apparently, made that memorandum? A. It was made by me in just running up here roughly.

Q. You made the memorandum? A. Yes.

Q. It is correct, is it not? A. Well, I supposed it was correct when I put it down; I did not know it was to be taken up here and thrashed over or I might have looked it over closer. It appears to be a memorandum which I put down here some time or other for some reason or other. The book shows exactly what Mr. Graham did and what was done at the building; this memorandum may or may not be correct.

Q. Now, you have stated in your answer to counsel's ques- (6956) tion as to what was meant by net dimension block on page 745: "Well, a stone that would be quarried large enough to cut any of those particular stones out of would be a net dimension block." Is that your idea of a net dimension block? A. Yes, sir.

Q. That is a correct idea? A. Yes, sir; if I ordered a block from the quarry it would have to be large enough for me to cut that particular stone from it.

Q. And then you say "if it had the exact net dimensions as it was to be cut to, they would not have come to us." That is your idea of a net dimension block? A. Yes, sir.

Q. Now, if the blocks are too large it materially increases the freight bill, doesn't it? A. If they are too large; yes, sir.

Q. If they are too large they materially increase the cost of cutting, don't they? A. They would increase the cost of cutting some if they were too large.

Q. If they were large and rough wouldn't they very substantially increase the cost of cutting? A. Sometimes they would and sometimes they would not. There is a tool used in the trade called a bull set. Now, if he has two or three inches to take off he takes it off with that tool, but if it is only one or two he takes it off with a point and it does not go as fast.

Q. Now, say that this (indicating) is a cube? A. Yes, sir.

Q. When the stone cutter cuts at it, he only cuts from two sides, doesn't he? A. If it is going to be a cube he has got to cut it from all sides.

Q. Well, with this stone in this building, the thickness of it never made much difference, did it? A. No, sir; but—

Mr. McLANAHAN: Which particular stones are you speaking of?

Q. In stone cutting as a general proposition on this building, if you had a stone the cutter would cut only from two sides, would he not? A. There is not a stone that I know of that would go in that building with only two sides of it cut. I don't know of any stone that could be put in that building with only two sides cut.

Q. As a matter of fact, you said here that the thickness of it never made much difference?

Mr. CURRAN: Let the witness say what he does mean, from the facts.

Q. (Mr. HANLEY.) As a matter of fact, many of these stones as they came down from the quarry were so close in thickness that they did not have to be touched in that direction, is not that so? A. If they were a little over or a little under they went in just the same into the wall.

Q. It did not make much difference because you were going (there) to set it in concrete and different material anyhow? A. No, be correct, but brick.

Q. That left them three four sides. Now, when you cut a stone, the stone cutter does not cut all four sides? He cuts merely two sides, is not that a fact? A. I do not see how he would cut the four sides and the front. If this is to be a plain piece of ashlar, it would have to be cut.

Q. Doesn't the stone cutter cut down there and then down there (indicating) and not all around here (indicating)? A. If it is a piece of plain ashlar which Mr. Graham cut, he cuts a line right around here and around all the edges and then they put the machine on it and they chop it down with the machine.

Q. Do they chop all four sides down? A. They chop down the face and then the stone cutter takes it and he cuts it over after that.

Q. Now, you have stated that you considered 225 to 300 pounds—that you would consider a percentage of 32 to 86 per cent. excess all right?

The WITNESS: I don't understand that.

Q. You said that you did not consider 300 pounds to the cubic foot excessive?

Mr. MCLANAHAN: He said according to the particular stones it would run from 225 to 300.

Q. Did you say that? A. I stated that, that the stones (6999) would go from 225 to 300 pounds to the cubic foot, according to the kind of stone that had to be cut from it.

Q. That is 36 per cent. and 82 per cent. excess. Now, do you know the meaning of the word "net"? A. Yes, sir; I know the meaning of the word "net."

Q. Doesn't it mean in stone cutting just the same as it means everywhere else in life, free from excess? A. It means that when a stone is cut it is thinned down to net dimensions, but before it is cut it must have an allowance all around it so it may be cut to the net dimension.

Q. Gross dimension might mean almost anything, but when you say net dimension don't you mean free from excess? Will you answer that?

The COURT: If you can.

Mr. HARLEY: Yes, if he can.

A. I have answered that already. I said that the net dimension block was a stone large enough to cut a certain stone from, which, of course, would be a little larger than the finished block that the workman must have something to work on.

Q. Then it must be a little larger? A. Yes, sir.

Q. Two or three inches larger is enough, is it not? A. Three inches would be what is required.

Mr. McLANAHAN: Two or three more inches, or what?

Mr. HARLEY: I mean what I said, inches.

Mr. McLANAHAN: How can you have an inch in a cubic foot of stone?

Q. (Mr. HARLEY:) I asked you whether a leeway of two (2") or three inches for cutting was not sufficient and you said yes? A. I mean, for instance, if this paper was three feet long to give the cutter room to work on, it would have to be three feet, two or three or four inches.

Q. Then, if it was to be cut to three feet, then three feet two or three inches would be large enough for it to be cut? A. Yes, sir; or it might be larger and it would cut out just the same.

Q. Now, look at the paper which I hand you and state whose signature that is? A. That appears to be my signature.

Q. The date is June 19. Will you state what it is? A. Appears to be a copy of a letter which I wrote.

Q. Written by whom? A. Written by me.

Q. To whom? A. To Mr. Green.

Q. That is the original, just as you wrote it off, is it not? A. Well, I would not like to say; I would make memorandums and perhaps I might have written this to Mr. Green or I might have changed it.

Q. This is as you originally made the memorandum? A. This is the way I made the original memorandum.

Mr. HARLEY: I offer this in evidence, if your Honor please. (Reading:) "Baltimore, Md., June 19th, 1907. Mr. Bernard R. Green, Dear Sir:—The 8th and 14th shipments of rough stock was received on the 17th inst. as per the herewith (70th) enclosed invoices quite a number of them is unreasonably rough and a few is poor quality 5 stones marked thus on the invoice Mr. Graham thinks should be described to you with a view to remedying the same. A 5 is a rough stone beyond discretion which Mr. Graham has to drill 1' 0" of the face to make it square with the two bolts has a seam or shake in the end which tails in the wall that looked as if it might come off but the stone is now partly roughed and it may stand cutting it is unreasonably rough and no attempt has been made at *lightning* it A 5 is a stone that is unreasonably rough and no attempt has been made at Slabing to lighten it has shake in the

end which tails in the wall as shown. Mr. Graham has Stabbed off the face to make it square with the beds and chased. Such work should be done at the quarry and I have to agree with him in that B 19 is a piece of poor Soft Stone off the top of the Quarry is not fit to use for that Stone with a light mould on Bottom and the face Plinth. It can be used and we are cutting it for Q 5 a plain ashlar please So inform the Quarry Company and ask them to again Quarry and Ship us B 19, gain in *sub* is 1'5 and puts that piece of Stock where it will pass C 32 is also inferior Soft Stone and have enough to work into the 2' 0" rise courses and has been changed here to go higher.

B 11 and C 26 is two Stones with a *bad* Slab or Shell hanging on to the Backs of them which is no use to the Stone or Mr. Graham and might have been *worked* off with one blow from a hammer or Pedd off, thus saving him about $1.50 in freight as near as I can figure it out. That looks very Small and would be taken no notice of only for the fact that the piece C 26 2 is *bad* and has to be taken off in case they drop from the *derrick* on some of the men. We have notice that the 15 Shipment left the quarry on the 15th inst.

Very respectfully,

WILLIAM PIRIE, *Inspector.*"

Mr. HILL: We do not admit that these are copies of anything. They are just what my brother proves them to be and that is all.

Q. (Mr. HARLEY:) Look at the paper which I hand you and which is dated June 27, 1907, and state what that is. A. I don't find my name here, but it appears to be in my handwriting.

Q. Don't you know that it is your handwriting? A. Yes, sir; I think it is.

Mr. HARLEY: I offer this in evidence. (Reading:) "June 27th, 1907. Mr. Bernard R. Green, Superintendent of Construction, Building for the National Museum, Washington, D. C. Dear Sir:—The 13th Shipment of rough Granite received as per the enclosed Invoice returned, with the exception of two Stones this head is all Stones of a kind and Shows plainly that they had to quarry to get them, not being able to pick them up from tail ends. The quality is fair and the Patterns looks fair the Depth of the 8 A Stones referred to as you will see by the Invoice is 1'2" ashlars without heads, and runs in

depth from 1'6" to 1'10" the Rise is 2'0" and 2'1" on Invoice but the Stone has been drilled at 2'5 and 2'6 allowing about 5" and 6" on the rise which 2" to 3" is all the allowance that is necessary thus making that load not only unprofitable for Mr. Cook Graham but themselves had they drilled the rise giving the proper allowance of 2' or 3" they could have taken one load more stock out of that piece of good ledge 6" and 8" should have been drilled and *stated* of the backs of the S A Stones reducing the Freight to about what it Should be may be 55 or 60 cubes instead of 55 or 60 as I expect it will be the Bill is not yet in a note on that Invoice *c f* [illegible] to A 38 a very Small and unimportant Stone with Stock enough in it to make two Mr. Graham is however not bothering about that he will run it aside and pick up any where around the Shed a tail end that has been drilled off about the usual size for that small Stone and cut it for what Should you think it best to again write the Quarry contractors about these needless width and waste of stone and labor touching on? I would Suggest that you caution them against the other extreme Mr. Graham is entitled to a *liberal* allowance of 2" or 3" to work on and will find no fault with any thing reasonably done to day.

"We have notice from Bethel that the 20 Big must went out on the 25th inst making Seven cars on the way that we know of."

Q. (Mr. HARLAN) Look at that (indicating) and state what that is, please, Sir. A. That appears to be my writing.

Q. This is dated July 10, 1907. If it has not already been offered in evidence, then we offer it now. (Endorsed: "Baltimore, Md., July 10th, 1907. Mr. Bernard R. Green, Superintendent of Construction, Building for the National Museum, Washington, D. C. Dear Sirs:—14th Shipment of rough granite received as per Invoice. Mr. Graham has called our attention to a blow on this load that had been 6" over depth and had been drilled and Stabbed at the Quarry all around the edges *coming* in about 6" and leaving the solid rough *block* without even attempting to take a few Plugs off as they should and would *have* done if they had to pay the freight. When Mr. Graham asks us if these are the not dimension blocks *referred* to in the Specifications I have to frankly admit that they are not. They Should not only be Stabbed around the edges but the Middle should be plugged down and when they *do* that they are *finish* the next dimension blocks are drilled and there will be no trouble in that line. Mr. Graham is looking for nothing unreasonable and is expecting them to do nothing that any other Quarry would not *do* of their own accord. What he expects of them can be done on Bethel Stone as easily as it can on woodstock or any other. I write you some time

ago about a load that was quarried about 5" or 6" to large and expected the freight would be 55 or 60 cents pr foot the Bill has since been received and is 59 cents pr foot the freight on the last cars we have received is 41 cents pr. foot. They could seldom if ever tell that it costs Graham for extra freight.

"On the last few cars we have received considerable plain a blars with 8" and 12" beds the lower courses on both sides of the door way and right over the Portico floor *quit* a number of them when the stone is first laid have soft black spots in them *running* about ½ Doz in some or less to a face they brush out with the stone cutters become leaving a hole about as large as the end of a finger. Mr. Graham has lowered and put consid- (706) erable extra work on some of them on that account it is however unreasonable to expect that of him and in lowering for two or three bad spots we may get as many again to make the best of them when these stones is surfaced with the machine before they are jointed I change the Diagrams moving some up as high as I can and around on to the return as the case may be getting them as far from the door way and the eye as I can moving the best ones down occasionally which will help the cause. But the stone is not near as good as the sample and stones spotted as they are can be told at the Quarry as well as after they are cut they are got near the top and we don't have that trouble with headers and other Square and larger stones which they have to get lower down in the Quarry. This interchanging which I am doing will help the cause as we understood it if we are fortunate *ly* enough to get better ashlars if nothing is said about this I expect they will try the next lowest grade which I think I would have to ask Mr. Graham to put aside for use above the cornice under the drawings is made.

"Please let them know at the Quarry what we are doing in order to get passable work around the maine entrance and over the Portico floor.

WM. PIRIE."

Q. Now, Mr. Pirie, look at this writing dated July 25, 1907, and state whose signature that is. A. That appears to be mine.

Q. Is it yours? A. Yes, sir; it is mine.

(706) Mr. HARLEY: I offer this in evidence, if it is not already in evidence. This is the letter in which you say: "I think from what you see here the other day and what you have read on the subject you are satisfied that Mr. Graham has not been getting the net dimension block that he might reasonably expect to get under your Specification of Sept. 29, 1906;" and you wrote further on: "a great deal has been said by the peo-

ple that handles that stone about the way it lays in the hill. That is will not split as other stones does and because it is Bethel we are lucky to get it any way that they can get it with the least pains about that I have to say that lines can be laid on Bethel stone giving a 2' 0" 3" allowance and split as well as any other stone." You wrote that?

A. Yes, sir.

Q. Will you tell me about how much ashlar the Government cut, about how many cubic feet? A. I never cubed that, sir. I could tell you in a general way. The Government cut all the ashlar which was expensive to cut.

Q. How much plain ashlar did you cut? A. I couldn't tell you, I never figured it out. I know they cut all this and all this here (indicating) except a small three-cornered one here, and all this from the base up here. Mr. Graham cut this (indicating). The plain work here and the plain work here on the dome and down in these corners he cut.

Q. (Mr. McLanahan) That is what Mr. Graham cut?

A. Yes, sir.

Q. (Mr. Harley) That is not what I asked you. I asked (707) you about how much the Government cut, about how many cubic feet?

The Witness: How many cubic feet of ashlar?

Mr. Harley: Yes, sir.

A. I couldn't tell you, sir. I never figured it up.

Q. Well, about how many? A. I couldn't tell you. The Government cut these little three-cornered pieces on all the pediments. The good large square stones were cut by Graham.

Q. Do you mean that none of the large ashlars were cut by the Government? A. I mean that none of the large ashlars—there was one course up here that did not arrive in Baltimore until Mr. Graham stopped and he did not cut that—I think he only cut one stone of it.

Q. Well, look at this memorandum and state who wrote it?

Mr. Hill: We have no objection to this, but we do not know anything about it and my brother must show who made it up and what it is. That is not a copy of any letter which we have at all.

A. I do not see my name on that.

Q. Is it your writing? A. It is my writing except the date; I did not write that.

Q. You did not write the date? A. No, sir.

Q. The balance of it you did write? A. I wrote that (indicating).

Q. I will ask you to look at that and say if you wrote it? (Paper handed to witness.) A. I wrote the exception of the date.

Q. Which is exception of Washington, D. C., and July 25, 1907, you wrote the balance? A. Yes, I wrote the balance.

Mr. HARLEY: I offer it, if your Honor please. (reading:)

Washington, D. C., July 25, 1907.

Mr. Bernard H. Green,

Dear Sir:

Yours of the 25th inst. about hurrying Setting Plans for St. Louis. I may say that when Mr. Graham's letter arrived here on the morning of the 20th it was forwarded to his draftsman on Baltimore Street at once with instructions to answer it. On my way home this evening I called on him to see how he was doing and found a sheet on his board which he assured me would be in your office on the morning of the 29th or by the time you receive this and that he expected to be able to give you one sheet per day every day next week after that on the Stronghold. I think it best not to Schedule ahead of the drawings although that is practical. The setting plans have to be made and they should be further advanced than they are. We have received the Quarry invoice for the 55 carload shipped. After that was checked we found that 161 stones remains at the Quarry to finish to the top of 11 course only a few stones is thus far included on the last drawing sheet viz. 7 *Inches* nearly all of it at the Quarry and with the exception of two or three pieces of the 8 Columns they are all at the Quarry leaving a fairly good variety of sizes to work on in my opinion but no chance for Inferior Stock or stone below (700) how the Standard of Sample Graham will not cut that it of course may be claimed that the above is all quarried. Whether or not the drawings should be further advanced and I have urged to impress on Mr. Graham and his draftsman the advantage in getting them out so as the stone may be all quarried before freezing weather, when the quarry contracts will stop anything at all and lay the blame to the frost and lack of drawings in summer time and perhaps enter suit for delay.

"They should get no excuse for lack of drawings but it seems to me they ought to be expected to fill out the lower courses first, and I think the Inspector should warn them against quarrying and piling up Inferior Stock to ship later on for any part of the work to be cut by Graham.

"Stone remaining at the Quarry.

"B	2
C	3
D	3
E	1
F	6
G	7
H	4
I	9
J	11
K	12
L	12
M	21
N	22
O	14
P	18
Q	16

164 Stones at the Quarry to finish to the top of Q course (710) after checking up 35 shipment with notice of only a few stones shipped on sheet No. 7.

"the above with drums and bases for the 8 columns should give the quarry a fair variety of sizes to work from."

Q. Now, I think you have stated to this jury three times that it was not practical at the quarry to cut or go ahead without setting plans. Tell the gentlemen of the jury what you mean in this paper when you state: "On the strength of that I think it best not to schedule ahead of the drawings, although that is practical." Explain that to the jury. A. It appeared to me that the drawings would be out so soon that it would be better to wait for them, because they were to be gotten out at the rate of one a day. I might state that I called on Mr. Mason after that and I told him that I had written to the office to that effect. That gentleman stated that he had lied to me about that but not intentionally. Mr. Graham called at my office and told me to drop that and take up other work, and the drawings, instead of coming down one a day as promised, did not come down one a week, and of course I supposed that the drawings were to come as I was told and I kept away from

scheduling. The drawings did not come and by and by I believe we scheduled.

Q. Have you finished A. Yes, sir.

Q. Is it or not practical to schedule ahead of the drawings? A. It is on that occasion.

Q. Then it is practical to go ahead of the drawings? A. (711) It was practical on that occasion.

Q. Then look at this setting plan No. 20 and state what is the date of its approval. A. January 29.

Q. Look at your D A course on your book, will you please look at D A? A. I have D A.

Q. When were those stones received at Graham's yards? A. I see one here received December 3, 1907.

Q. See whether, as a matter of fact, 16 out of the 28 were not received before January 24. They were received then over nearly a month before this plan was approved. A. There was another plan approved and they were gotten from that.

Q. They were gotten from another plan? A. Yes, sir.

Q. Look at D B and state when the first of those was delivered? A. Here it is, December 27.

Q. When was the first of these delivered (indicating)? A. December 9.

Q. Now your explanation is that they were furnished from a setting plan prepared prior to this time, is that correct? A. Yes, sir.

Q. Is that (indicating) the setting plan? A. I think it is.

Q. You think that is the setting plan? A. Yes, sir.

Q. Are you sure that is the one? A. Yes, sir.

(712) Q. This is dated October 11, and approved October 21, 1907. Now, that is where they got these sizes? A. Yes, sir; they got the sizes from that drawing.

Q. As a matter of fact, did not the original drawing show the location of each stone? A. It shows them in one corner but not all around.

Q. Doesn't it show the location and size of each and every stone? A. It shows them along with other details.

Q. I simply ask you whether or not those original drawings show the location and size of each stone? A. I don't think they do. There are no figures on the original drawing up here. They have to be laid down and the size gotten from that.

Q. Mr. Harris stated on page 691 and 2 in answer to the question: "And are they not to show the exact size of every stone and what stone must be in the wall?" And he answered: "Practically, yes." Is that correct, sir?

The WITNESS: I do not understand that.

Q. Don't those original drawings show the size and location of every stone placed in that building or to be placed in that building? A. No, sir; they show the rise only.

Q. They do not show the location? A. No, sir, that plan cannot show the location in the back of the building. It only shows the location in this particular corner. You cannot get (713) the length until you lay it down.

Q. Do you mean to say that the nine original contract drawings do not show the size and location of each and every stone in that building? A. I mean to say that that one (indicating) does not.

Q. But I am referring to the nine drawings referred to in these specifications, Nos. 148, 149, 150, 151, 152, 153, 154, 155, 156, 157 and 158. A. I don't know what numbers they are.

Q. Now let us get at this thing substantially and thoroughly: Don't you know that the nine original drawings do show the location and size of each and every stone in this building? A. I will state to this jury that I handled these drawings some two or three years ago and I don't know whether the particular numbers mentioned are the drawings?

Mr. McLANAHAN: After you get done I would submit that you hand that paper to the jury and see if they can pick out the size and location of the stones.

The COURT: Show him the plans.

Q. Here are the plans, there are seven here and there are two there on the wall making nine in all. I ask you whether they do not show the size and location of each and every stone in the pavilion C? A. I recognize this as showing the front without any figures except heights.

Mr. HARLEY: Look at all nine of the drawings and answer the question, please.

A. I recognize this (indicating) as a plan of the work giving over all figures. I recognize this (indicating) as a (714) plan of the dome; this (indicating) is a section through a part of the work; this is another section; this is a section showing stone work or a plan of the front; this is another plan of the same thing showing the columns and front.

Q. Is that all of them? A. That is all of them.

Q. Can you now answer the plain question which I will put to you: Don't these nine drawings referred to in the specifications show the size and location of each and every stone in pavilion C? A. I cannot see that on the drawings.

Q. You cannot find that out? A. I cannot find the figures.

Mr. Hill: He did not say that he could not find out from the drawings.

Mr. McLanahan: But that is the duty of the contractor to find out what they are.

Q. (Mr. Harley:) Do you mean to say that you cannot tell from these drawings the size and location of each and every stone in pavilion C? A. I cannot find the figures on the drawings. They can be worked up by an architect. I am not an architect.

Q. Tell the jury then how you made up that calculation before this contract was awarded and figured out that there were 64,000 cubic feet in the building? A. I made that from a scale dimension, as I said.

Q. But you cannot tell from these drawings the size and (715) locations of the stone? A. Only by figuring it up.

Q. But persons who could read drawings accurately, could n't they tell the size and location of every stone in that building? A. By laying down and working it out.

Q. They would indicate to an architect the size and location of each and every stone? A. That would be correct.

Q. Now, you are familiar with the specifications? A. I have not seen the specifications for a couple of years and I do not remember about them.

Q. You do not remember anything about them? A. No, sir; I could not keep them in my head all that time.

Q. Can you point out any place in there a specification requiring the use of the setting plans at the quarry? A. I don't know; I could not tell you that.

Q. Look at this letter and state whether you wrote that, sir? A. That is my handwriting; I don't see any name signed to it, but it is my handwriting.

Q. You know that you wrote that, don't you? A. Yes, sir.

Mr. Harley: I offer this, it is a copy of a letter of July 31, 1907.

The Court: Written to Mr. Green?

Q. (Mr. Harley) This was written to whom? A. It is not addressed to anybody in particular.

Q. Do you know to whom you sent it? A. I don't know. (716) I might have written it and hung it right in my desk and then never wrote it over, but just had it as a memorandum.

Q. Tell the gentlemen of the jury to whom you returned the invoices of 25 and 26 carloads? A. I returned them to Mr. Green, but I might have written that intending to send it to him, intending to send it to Mr. Green and then never sent it.

Q. That is what I want to know, did you intend to send that to Mr. Green? A. I don't know whether I did or not.

Q. Look at it and see. A. I wrote it, but what I did with it after writing it I am not prepared to say.

Q. Whom was it originally intended for? A. It does not say.

Q. (The Court) Whom did you have in mind? A. I would look the stone over and then I would write a memorandum. I did write that (indicating) but I might have written to Mr. Green during the day and changed my mind. I may have written to him during the day and I may have had occasion to change my views and write him something entirely different from this.

Q. (Mr. Harley) And you cannot say to whom you intended this when you wrote it? A. I wrote it for the office, but I cannot say whether I did not change my mind about it.

Mr. Harley: I offer it in evidence and I will read it. (717) (Reading):

"Copy letter dated July 31st, 1907.

"Dear Sir:

"In returning invoices of the 25 26 carload rough granite received on the 27 inst. also the 24th shipment on the 30th I have to note *quit* an improvement the faces *on* nearly all smooth and what is known as gain faces the drilling on nearly all of the stones had been done on a 2" to 3" allowance a lot. of stones that had been quarried for what was marked on them, and not tail ends from something else. Such as we have mostly received when the first two cars was unloaded I consulted Mr. Graham telling him that I thought for encouragement to those that had been trying to bring about this shape and size of patterns I would write you and class the two cars as a fair lot he did not quite agree with me in that and showed

me some ashlar that was over thickness and he thought might be broken down with the bull-set which of course could be done at little cost to the Quarry, but unless they care to do that I doubt if that can be required at the same time I picked out a few ashlar that was less than the depth and Mr. Graham was satisfied with them. He has not seen the 24 car load. After receiving that and consulting his foreman in his absence I take it on myself to call it fair. On the 26th inst before receiving this three cars young, Partridge who represents the Thompson Starrett Company called to see about range patterns and other things we could not hold them here on Exhibition but did the best we could to show him what we had drilled from what was supposed to be net dimension blocks also the splits made here compared with the same thing done at the Quarry we (718) showed him the *Spalid* ashlars on the Bankers also showed him on the plate where they were supposed to go and where I was trying to put the worst of them, and asked him to so report to his company in order that we may get a better grade of ashlar and stone that Mr. Graham can cut without putting unnecessary work on it.

"was glad to see by note on invoice that stone L 24 not on 14th shipment had been located."

Q. You intended that for Mr. Green? A. I would have been intending that for Mr. Green, but during the day after I had written my memorandum I might see fit to change it.

Mr. HARLEY: I now offer this paper in evidence and will read it. (reading)

Mr. HILL: All these are to be copied in, I understand?

Mr. HARLEY: Yes, sir; I will have that done with much pleasure.

The COURT: How did these come into your hands?

Mr. HARLEY: They were left there.

The COURT: Left at Graham's?

Mr. HARLEY: Yes, sir; our bookkeeper and this witness practically ran the office.

Mr. HILL: Then we should have testimony on that point.

Q. (Mr. HARLEY) This (indicating) is also a memorandum by you? A. This appears to be my handwriting; there is no name to it.

Q. I know your name is not there, but you do not repu-
(7191) diate it. It is your handwriting? A. Yes, sir.
Q. And it was written by you? A. Yes, sir.

Mr. HADLEY: I offer this in evidence, and I will read it, with your Honor's permission. (reading):

"Copy letter Aug. 5th, 1907.

"Stone D 9 received May 18. 3rd shipment would not make on account of shake or seam in face which worked loose in cutting through no fault of the workmens here or oversight of the Inspector at the Quarry. To save what work and stock we could the stone was cut down to G 23 leaving in cub. 6' 1". Stock for G 23 was received on the 28 shipment but will not make D. 9. of course it will make W. 1. No. 8 on sheet 5, a stone 3' 6 7/16". 2' 1" x 1' 10½" cub. 15.6. Please instruct the Quarry contractor to check W. 1. No. 8 off as here and again Quarry and ship to Mr. Graham stone D 9 3' 11 x 2' 10½ x 20 *cub* 18.0. Loss in *cub* to the Govt in this transaction 2.6 cubic feet. Before the Shuffle it was 6-1 loss. "I am returning you invoices of the 28 and 30 cars and with the exception of a few stones which had *loss* Shells hanging on to the backs of them which Mr. Graham complains of I have to class the two loads as fair the quality of ashlar is also much better and I am moving good ones down in place of those that I moved up last month. I received Blue print of setting plan sheet No. 8."

Q. Here is a clause that does not appear in the original: you say "loss in cubic to the Government in this transaction is (7200) 2.6 cubic feet before the shuffle it was 6-1 loss"; what did you mean by that? A. That would be a stone that had something wrong with it and it was changed to another stone. I called that a shuffle, changing them around, and if there was any cubic feet lost in the transaction like that the loss would be to the Government. If they spoilt it or broke it the loss would be on him.

Q. That is what you meant by the shuffle? A. No, the changing around is the shuffle.

Q. Now I show you this diagram and I ask you who made it? A. I cannot identify that diagram. I do not see any figures or writing on it that looks like my work.

Q. Do you mean to say that it is not your work? A. I do not see anything there.

Q. No matter about the writing. I mean about the diagram? A. Those are not my figures and those are not my figures (indicating).

Q. Take that block, never mind about the figures. A. These lines are not mine.

Q. I am only asking you about the lines? A. I don't know anything about the lines. I could not say that I ever drew those lines.

Q. Didn't you draw that? A. I did not.

Q. You don't remember seeing it? A. I never remember seeing that.

Q. You have seen it before? A. No. I don't think I (721) have.

Q. You know that that is a diagram of a stone in these drawings? A. Yes, sir; it is.

Q. What is the number? A. C-10.

Q. This is it, is it not (indicating)? A. Yes, sir.

Q. What were the dimensions of that? A. Three feet six and three-quarters.

Q. That is the first dimension properly given. What was the dimension of the stone that was sent to us? As received at the Graham yards? Do you remember that particular stone? A. No, sir; I don't know anything about it; my book calls for 3 feet 6 ¾ and I see whoever made that diagram calls it 3 feet; this stone appears to be short, and I don't think I would make a diagram and show a stone short.

Q. As a matter of fact, do you remember stone No. 10 in course C? A. I could not hardly remember that, sir.

Q. And you never saw this diagram at all? A. I am not aware that I did.

Q. And can't you remember that that stone came to Graham's yard containing about four times as much material as was necessary for the block for which it was intended? A. There was no block that came to Graham's yard containing four times as much stone as was necessary.

Q. Didn't it contain three times the necessary number of (722) cubic feet to be carved from it? A. I have no recollection of it. I find the stone is put on a diagram smaller than it should be. I find there is only one and one-half feet to be put in the wall and there should be three feet; the stone would be short.

Q. How about the height? A. The finished height would be two feet.

Q. Do you know what it was? A. Two feet two and one-half, it is in C course.

Q. Mr. Pirie, as these invoices would come in from the quarry, who would measure the stone, do you know, sir, on the cars? A. I would get aboard the car and count them to see that they were all there, as per the invoice. They would then begin to take the stones off the car, and as they took them

off the car they had a diagram there. I would not have the dimensions in my head, or in my hand, when I was looking them over, but by and by they would take them off the car, the diagram would be there, and Mr. Graham's foreman would measure them according to the diagram.

Q. Who would take the actual measurement of the stone as they came in? A. The foreman would take the actual measurement to see if they were suitable to make the stone that they were marked for.

Q. Did you see those measurements made? A. I did not see those measurements made, but if there was a stone in the lot that would not make the stone it was marked for they would call my attention to it and I would go and measure that par-
(723) ticular stone. But if he said those are all right, I wouldn't measure them.

Q. Did you make any measurements yourself? A. I would make a measurement occasionally when they complained about excess, and if they complained about them being scant, that is small, I would make the measurements.

Q. Do you know that those measurements were put down in the book at the time? A. The measurements were put down in the book from the plans.

Q. I mean the actual measurements, not what the stone ought to be, but what the stone actualy was when it got to Mr. Graham's yard? A. I never took that measurement at all; I did not have anything to do with that. I simply put the dimensions of the stone in my book.

Q. The dimensions as they were taken were recorded in this book (indicating)? A. I do not know anything about that book.

Q. You do not know anything about that book? A. I do not think I do. I never saw it and I cannot state. Show it to me.

Q. I beg your pardon. A. If you show it to me maybe I can tell you. I cannot recognize a book now that was in use three years ago.

Q. Look at it and see whether you recognize it now. A. This is a book that is put up by somebody in Mr. Graham's office. That is all I know, at least I suppose it is.

Q. Do you know anything about it? A. I really didn't
(724) know anything about it. I never used it, and I did not check up by it.

Q. Did you see it? A. I see it here, but I cannot state that I ever saw it before. I may have seen it and may not have seen it. Of course, I have seen Mr. Graham's books lying in a heap, but about that particular book I cannot say anything.

Q. This book marked "Ledger," with the diagram in the back, the diagram that I have just shown you, you do not know anything about? A. I do not.

Q. You do not know whether the entries are correct in that book or not? A. I could not tell you what is in it; I could not tell you how many entries are in it.

RE-DIRECT EXAMINATION.

By Mr. McLANAHAN:

Q. We had some testimony here as to those sheets of paper that Mr. Harley has been showing you. Just what were they? A. What was that?

Q. This piece of paper. Mr. Harley, let me have that one of August 5th.

Mr. HARLEY: The stenographer has them.

Q. The pieces that you were testifying from in pencil writing that were handed to you this morning, two or three different ones or more than that, by Mr. Harley, about six of them I think. Will you state what they were? A. They (725) were pieces of paper that I had written on in Baltimore while I was down at Mr. Graham's yard.

Q. Where did you keep those memorandums? A. I kept them hanging on the wall, I believe, on a file near my desk in Mr. Graham's office.

Q. What was the shape of that file? Did you stick the papers on them? A. I think it was one of those clasps and I put them into that and they hung on the wall.

Q. In what part of Mr. Graham's office? A. On the West wall, I think.

Q. And when did you last see them? A. Well, I last saw them just before Mr. Graham stopped work.

Q. You saw them just before Mr. Graham stopped work? A. Yes, sir.

Q. When was it that you last saw them, just when? A. I could not just exactly tell. I know that when I went to gather in my things together, you know, after the work had stopped, I found that they were gone.

Q. They weren't there? A. They weren't there.

Q. And you haven't seen them since? A. No, sir.

Q. Not until today? A. Not until I saw them with Mr. Harley today.

Q. You testified in your examination in chief, as I recall it, that there was out of the 165 carloads of stone, sent to (726) you, stone objected to by you, to some fifteen car loads

as having some stones on them which were bad, and out of those fifteen car loads about twelve of those car loads had some stones on them that were rough. Were those stones that were mentioned in those memorandums that Mr. Harley has shown you included in that list of twelve that you spoke of? A. Yes.

Q. Those are some of the 12 cars on which there were some individual stones bad? A. Those letters that Mr. Harley read would be some of the 12 to 16 criticisms that I made of stones that arrived at Mr. Graham's yard on the first part of the contract, on the first part of the work.

Q. I notice the last one of these is August 5th. Were there any other stones that you can recall making any criticisms of after that last one of August 5th? A. Not as I remember of. I think the balance after that of the 165 car loads, while the balance was being delivered, I would return the invoices to Mr. Green, marking them fair stones, sometimes good stones, and sometimes stones which we see no fault to find with, and such remarks as that, and that would go along with the invoice to Mr. Green's office. That was after the 15 or 16 criticisms.

Q. In this letter of June 19th, or copy of a letter or memorandum, you mention the two invoices, 8th and 11th shipments. Will you look at the invoices for the 8th and 11th shipments and tell us the total number of stones in the 8th shipment? A. In the 8th shipment?

(725) Q. Yes, how many in the 8th shipment? A. 16 pieces.

Q. And how many in the 11th shipment? Each shipment means a car load, does it not? A. Yes, it means a carload.

Q. How many in the 11th? A. There were 22 pieces in the 11th load.

Q. Now, in that letter you mentioned 5 stones as being bad out of that total, is that correct? A. I probably did. I wouldn't just like to say; I do not just know exactly where I am at.

Q. There is a total of 38 stones in the 8th and 11th shipments, and 5 of those stones had something the matter with them. Did you make any criticisms of the other stones in this load? A. It isn't likely that I did because we never received more than a few bad ones in a car. They would never be all bad and there would occasionally be a criticism on one individual stone.

Q. Now, I hand you here the invoice for load No. 13. The memorandum was introduced in evidence by Mr. Harley and read by him which shows that two stones from this 13th load were criticised by you. Will you state what the total number of stones was on the 13th load? A. 11 pieces.

Q. And 2 of those were over weight, was that so? A. Perhaps it was.

(728) Q. It is so? A. It would be as I stated. I did not just recognize this now but I see I signed the invoice and just how many stones I criticised in this particular invoice, I could not state.

Q. Your letter which is in evidence shows two stones out of the 13? A. The letter would be correct.

Q. On the 18th shipment you made some criticism of the stone but I do not think the criticism shows the exact number of stones you criticised. Tell us the total number of stones in the 18th shipment. A. There were 18 stones.

Q. On the 18th car load? A. Yes.

Q. Were all of those stones bad, if you know? A. No, sir, they would not be all bad.

Q. They would not? A. No, sir; I could not tell you from this just how many were bad. My memorandum would show.

Q. Your memorandum which was offered in evidence does not show just exactly how many there were. Mr. Pirie, here is a statement which it has been testified was sent by Mr. Graham over to Mr. Green's office and purports to show the stone in cubic feet where those stones were that way, larger than the net dimensions. Now, the date of this is shown in the letter which accompanied it as being December 18th, 1907. Was there any rough stock on the cars after December 18th? I do not mean rough stone, but I mean any overweight stone after December 18th, 1908, if you recollect? A. I find in looking

(729) over the memorandums that I did not criticize any.

Q. Not after that time? A. They were not rough in my opinion, and if they had been so, I would have criticized them.

Q. So that all the rough stone which memorandums have been given for are all included in this statement, are they not? A. They would surely be all in there.

Q. This shows the dates of the shipments of the stone down in the first column? A. Yes.

Q. So that when he makes out the total of the freight due for extra work he makes out $874.40 in December, 1908, on the total amount of the contract; due Graham for roughing out, what is that? A. That would be taking off what he considered was surplus.

Q. And he makes up his total bill out of this rough stone to be $546.50 on the total contract? A. Yes.

Q. And the total is fourteen hundred and some odd cents? A. Yes.

Mr. HARLEY: What is that exactly?

Mr. McLANAHAN: $1,120.90 is the exact amount. Mr. Pirie, in making these memorandums about the stone, you speak of the 18th car load of rough stock, for instance. Do you mean by rough stock blocks that are over the net dimension? A. No, sir, I call a stone that isn't cut a rough stone. I do not mean that it is a bad or unshapely stone. I simply mean
(730) it isn't a cut stone and it is what we call a rough stone and know to the trade as such.

Q. And wherever it is mentioned all through here in that way it means uncut stone? A. Yes, sir.

Q. And it may be in proper shape to be cut? A. Yes, it may be called rough stone and in proper shape to be cut.

Q. Mr. Pirie, in answer to one of Mr. Harley's questions about whether or not these contract drawings showed the size and location of each stone in the building, you said that the contract drawing shows the rise of each stone. Now, do you mean by that the height of the stone? A. Yes, sir.

Q. Also the overall figures, what do you mean by that? A. That would be figures taken from center to center, or from one corner to another corner.

Q. Taken from center to center of the stone? A. From center to center of a pier or any place that the architects might decide to take it from.

Q. Will you show on the drawing there just what you mean by overall figures so we will get that down. A. This figure, gentlemen, would show that it was so much from the center here to that center, and from the center of that column to the center here is so much.

Q. Take it across here for instance? A. Well, it is 8' 3" from that line to this line (indicating) and then it is divided up into separate stones.

(731) Q. Do they show the joints of the separate stones? A. This is a pier and that would be the corner here and there (indicating).

Q. It is the corner of a pier and not a stone? A. It is.

Q. How many stones are there in that pier? A. Well, there would be two stones in that course (indicating) and three stones in the course up there.

Q. And the drawings give the overall dimension of the whole pier and not the dimension of the several stones, except the rise of the stones? A. It gives the height.

Q. The rise of each stone is shown? A. Yes.

Q. Not the dimensions of the stones? A. No, sir.

Q. How about the depth of the stone, how about the ashlar? A. It would be shown in sections.

Q. The depth would be given to you in some instances? A. It would be shown exactly in sections. This is the section that shows the depth to each particular stone and that one here

(indicating). I do not see the sections showing the depth of all the stones, but it would be found on some of the drawings. The sections up here show the depths of the stones and by looking over the drawing you could find them all.

Q. Mr. Harley asked you about some stones, if I recall correctly, about 125, that were not shown in your book?

Mr. HARLEY: 150 odd.

(732) Mr. McLANAHAN: Have you looked for the memorandums for these stones? A. I haven't looked yet, but I have got the memorandums of those stones somewhere amongst my effects. I thought that this matter was all done as far as I was concerned, at least a whole year ago, but I have now got to hunt up such things.

Q. Look for them tonight and see if you can have them here tomorrow morning? A. The book has so many of them and the balance is on paper.

Q. Now, you testified from this memorandum which was put in evidence about the total number of shipments in cubic feet of rough stock received by Mr. Graham, and the total number of cubic feet of rough stock sent over to the building. Now, these figures showing the total number of rough stock received by Mr. Graham, were they taken from that book or were they taken from the invoices? A. They were taken from the invoices.

Q. Where are the figures in the book gotten? A. The figures in the book was gotten, I mean these dimensions were gotten from the plans. The figures at the end of the book showing what was cut at the building was got from the schedules that I used to send to Mr. Green's office as we cut the stone. We put them on a schedule like this and sent it to Mr. Green's office, making an entry here on the book of how much there was on this particular schedule. On the first schedule I turned in 298 feet 24, and on the 5th I turned in 375 feet 11¼.

Q. Those schedules that you sent in to Mr. Green were (733) not copies from this book but they were taken from the stones, were they not? A. They were taken from the stones as they appeared cut, but the dimensions on the schedule is taken from the book.

Q. The dimensions were taken from the book? A. If the stones were on the book.

Q. Supposing the stones were not on the book. A. They were taken from the schedule or from the plans, whichever seemed to be the most convenient.

Q. Those stones that do not appear in the book, you have given Mr. Graham full credit for the amount that he cut on them? A. Yes.

Q. On this memorandum? A. Yes, I gave him credit for that and I took credit for just what we cut which is shown on schedules going to Mr. Green's office.

Q. But you did not make up those schedules, but made them up only for what is shown in the book? A. I made up the schedules to Mr. Green showing the stones that we cut.

Q. And where you had the dimension of the stone you put on the schedules the dimensions from this book and where you did not have the dimension of the stone you put them on from the quarry schedule, or from the plans, whichever was the most convenient? A. Yes.

Q. So all the stones were accounted for in these schedules that were sent over there to Mr. Green? A. Yes.

Q. That first column represents the total as shown by those schedules as being sent to Washington? A. This represents the total rough stock received at Mr. Graham's yard.

Q. I meant the second column? A. This column here represents all the stone cut and invoiced from Mr. Graham's yard. This shows all that he cut as taken from his invoice.

Q. And these invoices that we have offered here, and on which there were these red figures, with Mr. Freas' name, include all the stone that was sent by you to Washington?

(Objected to.)

Q. I will change the form of the question. Will you state whether or not these invoices, the invoices that we went over here yesterday, and about which Mr. Harley asked you about these red marks of Mr. Freas', and about the actual dimension of the stone, do you remember that? A. I do.

Q. Will you state whether or not these invoices include in them all of the stone which was sent to Washington from Mr. Graham's yard, including any of the stone which doesn't appear on that book? A. These invoices here, I think, if these are Mr. Graham's invoices, would show all of the stones (735) cut in Mr. Graham's yard, except, I think, 13 which Mr. Graham never invoiced.

Q. Answer this question. Did or did not a stone have to appear on that book before it was put into that invoice sent over to Mr. Green? A. No, sir, there is quite a number of stones in these invoices that I know Mr. Graham cut that do not happen to be in that book. They are on the other part of the schedule. But, I would state that the invoices represent all of the stone that Mr. Graham cut except the 13 which he was credited with as being taken out of the yard with the rough stone.

Q. Mr. Pirie, you testified this morning in answer to a question of Mr. Harley's, that the total, as I understand it,

of the stone delivered to Mr. Graham during the months of November, December and January was some 19,899 cubic feet from your schedule here. I believe you testified in November there was sent to Mr. Graham 6,302 feet, in December 8,337 feet and in January 5,559 feet. Now, Mr. Graham's contract was entered into on October 23rd, 1906, and was to be completed by the 1st of October, 1907. How long is a reasonable time for quarrying the stone after the setting plans, or quarry schedule is made up at the quarry?

Mr. HARLEY: I object to it as being improper re-direct, and improper for this witness to answer, if your Honor please.

The COURT: Is that the only objection?

Mr. HARLEY: I think it is improper to ask this witness anyhow without laying the foundation.

(Objected to, objection overruled.)

(739) Mr. McLANAHAN: I asked Mr. Pirie this in the beginning but I will ask him this again. How long have you been in the stone business? A. 10 years.

Q. Have you ever had any experience with quarrying stone? A. Yes.

Q. Where have you had it? A. On the Congressional Library and from being around the different quarries and plants.

Q. Tell us what quarries you have been in in this country and abroad? A. I will begin with this country. I was in the quarries in the State of Maine, and in the Cutting Plants in the State of Maine, and in Concord, N. H., and in Vermont, and in Milford, Mass. I have been in Woodstock, Md., in the Cutting Department and quarry at the same time, and, of course, it is well known that I have been around quarries and Cutting Plants.

The COURT: Objection overruled.

(Question repeated to the witness.)

A. Do you mean all the stone?

Q. I mean when any setting plan or schedule is made up at the quarry for any one stone, what is the average length of time that it may take to get that particular stone cut. I know it varies between the different stones. How long does it take on an average? A. It would vary according to the weather.

If the weather was good they would soon get out a car load of stone at the quarries.

(737) Q. Could they get that car load of stone out inside of two weeks if it was simple easy stone to quarry? How long a time would it take? A. If the weather was good and everything was in their favor they could get out a car load a day.

Q. From the quarry? A. Yes, if they were working on it and the weather was in their favor, but if they were froze out or snowed out they wouldn't get out any.

Q. I mean from the time that you first get your schedule, or setting plan, at the quarry, can you tell after that plan came up there when the quarry would have you a car load of stone out? A. If the quarry was in condition to begin and drill that particular kind of stone; you might have the work for a day or two to get the stones clear.

The Court: Is it possible to state any average time?

Mr. McLanahan: Did you ever hear of that being done? A. What being done?

Q. Say a schedule was for 25 stones and it came into a quarry, do you think that they could get out all 25 stones in one day and have it put on a car? A. Yes, if they were small stones they would pick them out without quarrying at all; they would go around the bank and pick them up.

Q. So that the testimony in this case shows, beyond what I told you a moment ago, that the setting plan was not approved until December 21st, 1906. Now, that would leave, accord-
(738) ing to my calculation, between December 21st, 1906, and October 1st, 1907, nine months and a week or a little over. You also testified that your estimate of stone on this job was 61,000 cubic feet by actual measurement? A. Well, it is a little over that.

Q. But your estimate was that there were 61,000 cubic feet actual measurement of stone. Now, how much stone a month would you have had to send to Mr. Graham during that nine months and one week in order to have all the stone in there by the 1st day of October, 1907, the setting plan was not approved until December 21st, 1906, the contract was to end October 1st, 1907, and you had 61,000 cubic feet to get out during that time. How much a month would you have to send? A. About six thousand.

Q. It is a little over six thousand, isn't it? A. Perhaps a fraction.

Q. A little over six thousand cubic feet a month? A. Yes, sir.

Q. So that when you sent to him during the months of November, December and January, 19,899 cubic feet you were

not very much over the average for those months? A. Not much.

Q. Does that look like piling stone to you, as an expert? A. No, sir, the stone growed.

Q. Now, you have testified, Mr. Pirie, I understand, that the Government cut 1,147 stones and that Mr. Graham cut 1,911 stones? A. I believe I did.

(739) Q. Now, but you have also testified that the Government cut, according to quarry cube measurement, some thirty-eight thousand, five hundred and eleven cubic feet, 5½", and that Mr. Graham cut 29,031 feet 10½", according to quarry cube measurement. From that what would you say as to the size of the stone cut by Mr. Graham as compared with the size of the stone cut by the Government? A. I have already stated that Mr. Graham cut all this ashlar.

Q. Show us the courses from A to S that you testified were all cut by Mr. Graham? A. This is A to F (indicating).

Q. S.? A. A to F, that is it.

Q. And in this course from A to S, what is there except plain ashlar? Those columns do not come in this course? A. They do not.

Q. What else is there in there except plain ashlar? A. The fluted pilasters are behind the column which you do not see.

Q. You have already told us on Direct Examination that he cut the fluted pilaster? A. Yes.

Q. What about this doorway? A. Mr. Graham, I stated, cut this stone around the doorway.

Q. Was it carved by him? A. No, sir.

Q. Was it to be carved? A. A. It wasn't to be carved by him.

(740) Q. Was it to be carved by anybody? A. It was to be carved by the Government at the building.

Q. Then all he had to do was to rough it out, was it not? A. He cut it, we call it.

Q. All of that except the pilasters and this door work is plain ashlar from A to S.? A. Yes.

Q. You testified that he cut a good read of Z course, what is that (indicating)? A. This is known as headers, and in this particular stone that he cut, one front and one head off is known as headers. This is plain ashlar all around here. This was also cut by Mr. Graham. The four corners like this on the building was of course plain ashlar.

Q. What have you to say when you come to those fluted column bases? A. I have to say in the first place that they have to be cut full and fine to begin with.

Q. You have testified in answer to a question of Mr. Harley's that you cut a very small number of cubic feet in

working on the job in Washington and that at the time you were cutting that small number of cubic feet during December and January you were working on these columns? A. Yes, sir.

Q. Does it take you longer to cut the same amount of cubic feet in the shape of a column than it does in ashlar? A. It takes longer in a column. You have to cut, and not only (741) cut it but get the true surface, fluting it afterwards. It is the fluting and mouldings around the bottom and the neck which counts, and the roughing it. This is a high point here and the balance of the stone have got to be cut down to that.

Q. Then as I understand your testimony you say that Mr. Graham didn't do any of this dentil course at all, is that correct? A. I think that I stated in the paper that I have shown that Mr. Graham cut three of those stones and one was in his yard after he stopped work. That was partly—

Q. How about this dentil up here? A. He did not cut any of them. They come around on all four sides of the building.

Q. You testified he did cut some of this, I believe, 900 feet out of 1,300 cubic feet of this fret work? A. Yes.

Q. What sort of stones are they? A. He cut the corners with 50 and perhaps 70 cubic feet in some of the stone.

Q. Did he cut the small ones? A. He didn't cut the stones here with a corresponding amount of work in them and only 20 feet in them. He didn't cut them.

Q. He cut the ones with the largest number of cubic feet in them? A. Yes.

Q. You spoke, Mr. Pirie, in the first part of your Cross Examination when you were going over one of these statements (742) showing the cubic feet and cubic inches, that 12 cubic inches made a cubic foot. Now, according to quarry measurements, is a quarry inch an actual cubic inch? A. It is the twelfth part of a foot in reference to inches in cube?

Q. That is the quarry cube measurement? A. Yes, sir.

Q. It doesn't mean the actual cubic measurement, but it means the twelfth part of a cubic foot? A. Yes.

Q. Now, in talking about the quarry cube measurement, you said, I think, in answer to a question of Mr. Harley, that the difference between the quarry cube measurements and the actual measurements, and the actual dimension of the stone was if any dimension was less than 12″ and you were measuring that stone up by quarry cube you would take it as though it were the whole 12″, is that correct? A. That is correct.

Q. Now, suppose the dimension is over a foot, then would it be the same whichever way you measured it? Suppose you had a stone, the dimensions of which were all longer than one

foot, the rise, the length, and the breadth, the thickness, of the stone were all greater than one foot, would the measurement by the actual dimension and the measurement by the quarry cube come to the same thing? A. It would come to the same thing as long as the stone has no dimension which is less than 12″. All stones above that would be the same whether measured by quarry cube or any other kind of cube.

(743) Q. Take for example a stone of 1′2″ x 1′2″ x 1′2″? A. That would cube by 1′2″ x 1′2″ x 1′2″.

Q. Whether you take it by quarry cube or any other way? A. That would be cube in the quarry or any other way you want to take it. If there is any dimension on the stone that is less than 12″ you call it 12″ and then it is quarry cube.

Q. Mr. Pirie, will you look at this paper which purports to be a letter dated April 16th, 1907, signed by you, addressed to Mr. John G. Shelby, Chief Clerk. Refresh your recollection and state whether or not you wrote that letter. A. The letter appears in my handwriting addressed to Mr. Shelby, Chief Clerk.

Q. Did you write it? A. Yes.

Q. That is your handwriting? A. Yes, I did write this whatever it may be.

Q. Now, will you look at the first part of that, I think that is the only paragraph that refers to this, and if possible refresh your recollection from it.

The Court: What is the date of that letter?

Mr. McLanahan: It is dated April 16th, 1907.

Q. Will you look at that and see whether or not from that you can say that you enclosed that letter that I now hand you to Mr. Shelby? A. This is a copy of a letter that was addressed to Mr. Graham, in his office and was given to me to forward to Washington, I think.

(744) Q. Will you state from where you got this letter? A. I received it from Mr. Graham.

Q. You got this letter from Mr. Graham, did you? A. Yes.

Q. And this is the letter which you sent on to Mr. Shelby? A. Yes.

Q. Now, the date of this letter is April 15th and we offer this in evidence, if your Honor please, April 15th, 1907.

Mr. McLanahan: The letter is to Mr. F. F. Graham, Esq., Calhoun St. & B. & O. Railroad, Baltimore, Md. The letter is on the head of the B. & O. Railroad Company, Office

of Division Freight Agent, Baltimore, Md., and E. M. Davis appears at the top of the letter, which is as follows: "In reply to your favor 11th instant concerning lack of care for stone from Bethel, Vt., to your switch Baltimore, would advise that I have addressed our eastern connections on the subject but regret I cannot at this writing give you any encouragement as to probability of equipment being supplied. Very few of our cars are loaded as far east as Vermont and the scarcity of equipment is so general that as soon as cars are unloaded at destinations of the lading it is found that loading is awaiting them. Consequently, movement empty to other points for loading is difficult to arrange. Yours truly, E. M. Davis, D. F. A."

RE-CROSS EXAMINATION.

By Mr. HARLEY:

Q. You have spoken of all the stones of the fret work and of the fluted columns. Now, will you tell the court and the (715) gentlemen of the jury which is the more expensive work to cut per unit, the fret work or the fluted column? A. The column in my opinion.

Q. What? A. The column.

Q. Would cost more per cubic foot than the fret work to cut? A. Yes, sir.

Q. (Mr. McLANAHAN) Do you recall the total number of cubic feet in all the columns without the capitals and without the bases? A. Yes, sir. I did that the other day. I just forget it at the present time.

Q. Have you the memorandum that you had the other day? A. Yes, sir, there would be 5,424 feet, I think.

Q. And who cut all of them? A. We cut all of them.

Q. You did? A. Yes, sir.

Q. And of the fret work how much fret work did Mr. Graham cut?

Mr. HARLEY: May it please your Honor, this has all been gone into.

Mr. McLANAHAN: That is 960 feet.

A. Mr. Graham cut about 955 feet and we cut at the building, stones which had the less cubic feet in them but as much fret as the other ones, with only 199 cubic feet in them. That is all that we cut at the building.

(716) Q. And Mr. Graham cut 955? A. Yes, sir.

FREDERICK R. FREAS, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. McLANAHAN:

Q. What is your occupation? A. Builder.

Q. How long have you been in that business? A. From the time I went to the apprenticeship, 42 years.

Q. Where were you employed? A. In Philadelphia now.

Q. You are employed now at Philadelphia? A. I was at the first start generally in Philadelphia.

Q. Where were you employed during the years 1907 and during the first half of the year, and during the latter half of the year 1906, the whole of 1907 and the first half of 1908? A. In Washington, D. C., on the new building for the Museum.

Q. What was your position there? A. Master Mechanic.

Q. As Master Mechanic, what did you have under your (747) direction? A. The various foremen of the different branches of the work pertaining to that building.

Q. It has been testified here in evidence that part of that work was on Part C, the South Pavilion — A. Not generally as a Master Mechanic, not on that.

Q. Did you have that under you? A. Not as a Master Mechanic.

Q. What did you have it under you as? A. Just in the way of taking the men's names and giving them to the office.

Q. Who had charge of these men after March, 1907, who were cutting stone? A. Mr. Pirie.

Q. On Part C? A. Mr. Pirie.

Q. He had charge of them? A. He did.

Q. In that former question I meant March, 1908. After that time who had charge of them? A. Mr. Pirie.

Q. And you say you had charge of taking the time of these men who were working on this Part C after March, 1908, is that correct? A. Yes, sir.

Q. That is the men who were working on the stone cutting? A. Yes, the men who worked on the stone cutting on Contract No. 25.

(748) Q. And that is the contract we have here? A. Yes, sir.

Q. Now, was or was not the time of the men who were finishing up Contract No. 25, kept separate from the time of the other men who were working on other parts of the building? A. Carefully so; carefully kept separate and distinct.

Q. Will you tell us just how it was kept separate from the other men? A. Mr. Pirie would generally bring the men to

the office and I would take their names and addresses and enter them on what we termed the Gate Roll. Those names from the gate roll were then entered into the book.

Q. Which book? A. The daily time book which noted their daily time.

Q. Will you look at the papers which I now hand you and state what they are. A. All through?

Q. State whether or not you know what they are? A. These are the gate rolls.

Q. Have you examined them? A. They were used at the Museum Building.

Q. Have you examined them? A. I have.

Q. What gate rolls are they? Are they for all the work on the building or for just contract No. 25?

(Witness looks all through the papers.)

A. They comprise, I believe, all of the work on Contract 25.

Q. On Contract 25? A. Yes, from April, 1908, to April, 1909.

(749) Q. Does that time include any time of the other men on other parts of the work? A. None whatever.

Q. Are they the gate rolls that you spoke of a moment ago in your testimony? A. They are. They are the original entries of the men's time.

Q. And these are the ones on which you put the men's names? A. Mr. Lucher generally did that.

Q. Who was Mr. Lucher? A. He was a clerk there in the office for that purpose.

Q. You were also with Mr. Lucher? A. I was.

Mr. HARLEY: Did you see Mr. Lucher put the names there? A. Oftimes, I have.

Q. Did you always see him? A. Not always.

Q. Sometimes you did and sometimes you did not? A. But I would see the names there afterwards.

Mr. McLANAHAN: Now, Mr. Freas, will you describe to his Honor and the gentlemen of the jury just the way in which you took the time of the men, say on any one day, and give us an example of it? A. When Mr. Pirie would bring a man to the office I would take his name generally in full, if I could get it, and his address so as to know where to locate him in case of sickness, and I would set that down on a slip of paper which I would transfer to Mr. Lucher and he would put it on here.

(750) We would assign the man to a check number—

Q. Look at these and say whether or not those are the check numbers to which you have referred? A. Those are the check numbers which we used.

Q. Now, go on and tell us about taking the men's time? A. We would assign a man a check commencing with the number, I think it was 200, according to his rate of pay. If his pay would be $3.00 a day, that would be 200, if his pay was $4.50, we would skip some, $4.00 would be another number by skipping some; $3.00 generally commenced about 300. Then we ran through and skipped some more for $3.00 or $3.50. We would assign him one of these check numbers in their consecutive order when not occupied.

When we would take his name we would not give him the check that morning but we would turn him over to Mr. Pirie to start him to work. Oftimes if you would give the man a check he would go out carrying the check with him and we would be minus a check. We do not give him the check but we take his name and if that man was found to work during the day, we hang the check up on a board that is removable at night, you know, by him. And then he deposits it with the watchman as he comes in the gate. The watchman was instructed to take no more than one check from any one man and he was to take any man to task if he had two checks in his possession. That check was put in a slot of a box, something similar to a ballot box and there left, and when the bell rung (751) the watchman would receive no more checks from any man but would return the box to the office; then we sorted them out and arranged them numerically in columns of ten.

Q. Were Mr. Graham's checks separated from the rest? A. They were, by designating numbers, commencing at 200 and ending at 199, I think.

Q. And all of those numbers were numbers of men working on the Graham contract? A. They were assigned to Contract 25. Then, when we arranged them numerically I would call them down by columns and Mr. Lucher checked them on the gate roll.

Q. That is that roll there, is it not (indicating)? A. Yes. He would mark a stroke if the check was present and if, during the day, that man would go away, he would change that stroke to a fraction, whatsoever that fraction might be.

Q. You say you called off the checks on the morning to Mr. Lucher? A. Yes, sir.

Q. And then he would make the entry on that gate roll? A. Yes.

Q. Did you call those checks off correctly to him? A. We would check back again to see that there were no omissions. He would call back the absentees that appeared, which (752) I would note.

Q. What are the checks? A. Brass check numbers.

Q. Then after that was gone through with what was the next step in the keeping of the time? A. The next step, generally, in regard to the time would be that if there were any absences Mr. Pirie would come around sometimes before we would quite get through the calling of the checks and say that so many men were short, which we would compare with the gate roll and invariably find to be correct. If there was any difference he would then go out and ascertain if such were the differences. Possibly the men might be at the toilet and he might have, on his first casual going around, overlooked him.

Q. If a man would not get there until ten minutes after eight, what would be done in that case? A. If a man would get there at five minutes after eight he would not go to work until nine o'clock. The check would be held up by the watchman until the second bringing up by the watchman and he could not go to work until nine o'clock.

Q. How would that be marked in that case? A. ½ of a day.

Q. Was there any further checking up during the day after Mr. Pirie would go over and check up in the morning? A. There was.

Q. Who by? A. Mr. Hagan.

Q. Who was he? A. He was the clerk employed at the Library Building to aid in this work and he also come down for that purpose to take the time.

Q. What would he do? A. He would go around with, what he called, his field book in which he entered the names and checked up the men individually, seeing each man in the (?) face, and then he would come and compare it with the gate roll. If there was any difference he would go around a second time.

Q. And after all that had been done, and the gate roll checked up with Mr. Pirie and Mr. Hagan, what did you do? A. Mr. Hagan copied the time from the gate roll into the time books.

Q. What are these (indicating)? A. Those are the time books, I believe, the ones pertaining to contract No. 25.

Q. Will you look at them and say whether or not they are the time books pertaining to contract No. 25? A. They are.

Q. Did you copy the entries from the gate rolls into these time books yourself? A. No, sir.

Q. You did not do that? A. No, sir, I had nothing to do with contract No. 25 further than in that respect, further than what I stated.

Q. Further than as to the time? A. Only as to the time.

Q. What was done, if you know, after the gate rolls were

entered on these time books, what was done with the gate roll and the time books? A. They were placed upon my desk each evening. I would compare the one with the other.

Q. Did you compare the time book with the gate roll? A. I compared the time books with the gate roll each evening. (754) Q. Did you see whether or not they tallied? A. I did. If there was any difference I would go to see what it was in the morning. It would be explained in the morning.

Q. The next morning? A. Yes, but there generally was no difference.

Q. Can you say whether or not these time books there correspond with the gate rolls? A. I believe they do.

Q. You have looked over them, have you not? A. I have looked over them at these intervals each as the time was set down.

Q. Did you find them to be correct each day? A. Generally so.

Q. If they were found to be incorrect, what was done? A. They were put upon the desk for Mr. Hagan to explain the following morning.

Q. And then, the following morning, what happened if there was any correction? A. The necessary information was got from his field book.

Q. Were they made to tally or not? A. They were made to tally.

Q. Then after that, what became of the time book and the gate roll? A. The time book was sent to the office at the Library Building; the gate roll was retained at the office in the (755) building, our office in the Museum building.

Q. You testified to putting these checks on a board in the afternoon. How early in the afternoon would you do that? A. Not earlier than 3:30 or 4 o'clock.

Q. What time did the men quit? A. 4:30.

Q. Why didn't you put them out there earlier? A. There was no need to do that, and in the case that a man would come to the office after he quit to get his check earlier than usual, he would have to come to the office and his slackness of time would be noted.

Q. Do you look over the payrolls at all? A. Sometimes.

Q. Did you look over them? A. Sometimes but not very often.

Q. Did you see the men paid personally? A. Some of them I did and some of them I didn't. Some time we would get a stone cutter from Mr. Graham as Mr. Graham would not have work for his stone cutters—

Q. You mean Mr. Graham's contract? A. Yes, the contract, and instead of letting the man go we would work him

on another part of the building for two or three days until they got the stone bankered up, or may have something ready for him. We would use him in the *interim*.

Q. Then that man was borrowed by the Government and he was paid by the Government, was he not? His time was not charged to Mr. Graham? A. We would note his time against the Government. But that time would not be noted on this roll. It would be noted on this roll in the morning but transferred to the Government roll later in the day when it was noted that he was working on Government work.

Q. These time books, would they show that time as charged up to Mr. Graham? A. No, sir.

Q. They would not? A. No, sir.

Q. What was your duty with regard to material? Did you have any duty there with regard to any material in connection with contract No. 25? A. Generally, Mr. Piric, if he wanted material would come and make his statement to that effect and I would make out a formal requisition which would go to the office.

Mr. McLANAHAN: If your Honor please, I offer these gate rolls in evidence.

(It is hereby agreed that the original gate rolls here referred to may be used in any court at the hearing or in argument in this case.)

Mr. HARLEY: I object, with your Honor's permission.

(Objection overruled; exceptions noted on behalf of both defendants.)

To the admissibility in evidence of said original gate rolls the defendants and each of them then and there objected, but the court overruled said objection and admitted said original gate rolls in evidence.

To which action of the court in overruling the objection of the said defendants to the admissibility in evidence of said original gate rolls and in admitting the said original gate rolls as evidence, the defendants and each of them then and there excepted and prayed the court to sign and seal this their twenty-seventh bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Twenty-eighth Bill of Exceptions.

(757) After the matters set forth in the defendants' aforegoing bills of exception, all of which are hereby incorporated in and made a part of this, their twenty-eighth bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

Mr. McLANAHAN: I also offer these books in evidence—these time books, just the small library books.

(It is hereby agreed that the original time books or small library books here referred to may be used before any court at the hearing or in argument in this case.)

(Objected to; objection overruled exceptions noted on behalf of both defendants.)

To the admissibility in evidence of the said time books or small library books, the defendants and each of them then and there objected, but the court overruled the said objection and admitted said time books or small library books in evidence.

To which action of the court in overruling the objection of the said defendants to the admissibility in evidence of said time books or small library books and in admitting the said time books or small library books as evidence the defendants and each of them then and there excepted, and prayed the court to sign and seal this their twenty-eighth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Twenty-ninth Bill of Exceptions.

(758) After the matters set forth in the defendants' aforegoing bills of exceptions all of which are hereby incorporated in and made a part of this, their twenty-ninth bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

Mr. McLANAHAN: I offer in evidence these time checks.

Now, Mr. Evans, will you look at these papers which I now hand you and state what they are.

(It is hereby agreed that the original time checks here referred to may be used in any court at the hearing or in argument in this case.)

A. These are the requisitions pertaining to the material generally got for contract 25.

Q. Will you tell us whether you have examined those papers recently? A. I have, recently.

Q. And can you state whether or not they all relate to this contract 25? A. They all relate to contract 25.

Q. Are there any other items that appear on any one of them outside of contract No. 25 items? A. There are.

Q. Are those items which relate to other work than contract No. 25 work separately marked? A. They are not marked for contract 25. Contract No. 25 items are marked where both appear on the same requisition.

Q. Can you find one of them that has the two different
(759) contracts shown on there, for which the material was purchased? A. Here is one.

Q. Will you look at that requisition dated August 8th, 1908, and tell us what items on there are chargeable to Mr. Graham's contract, and what are chargeable to the other work around the Museum and tell us how you can tell one from the other? A. Read the whole thing?

Q. Yes, you can read it and explain it. A. The writing matter that is on here is 125⅝ x 2½ S. H. H. N. Bolts, square head Nut bolts, 70 feet, 1¾ x ¾ Bar Iron, heat and vent 36? Galvanized Malleable Ells Plumbing. That isn't for contract 25; it isn't noted so. One ton of Bituminous coal, granite carving, coal ordered from Johnson Brothers. Note: A portion of coal for granite carving should be chargeable to contract No. 25, about ¼. In red ink then is ⅔ tons for Museum, ⅓ ton for contract No. 25. I did not put those red ink marks on there.

Q. Do you know in whose handwriting that is? A. I do not.

Q. Whose handwriting is the rest of that in? A. Mine—excuse me—the first three items at the top are in Mr. Titlow's handwriting but not for contract 25.

Q. How would you tell when it is for contract 25 and when it isn't. Look at that requisition there and tell us. A. It is generally headed here Contract 25. If there should be a failure to have it headed here at the top it is noted in the right hand margin.

Q. Those items are in Mr. Titlow's handwriting (indicating)? A. Yes, sir.

(760) Q. Kindly state whether or not all of those requisitions are signed by you? A. They are generally approved by me.

Q. Approved by you? A. Yes, sir.

Q. Do you know whose handwriting this is down at the bottom of this requisition? A. The handwriting at the bottom of that requisition is Mr. Green's.

Q. Bernard R. Green? A. Yes.

Q. You know that signature, do you not, the signature of Mr. Green? A. I do.

Q. And this other signature here is Mr. Titlow's, the Master Steam Fitter? A. That is right.

Mr. McLANAHAN: If your Honor please, we offer these in evidence as being the requisitions for material furnished on this contract No. 25, **the Graham contract.**

(It is hereby agreed that the original requisitions here referred to may be used in any court at the hearing or in argument in this case.)

Mr. HARLAN: We ask that they come in subject to exception in order that we might have an opportunity to examine them.

The COURT: Very well.

Mr. HARLAN: Then they will be in subject to exception (761) as we have not as yet examined them.

Q. (Mr. McLANAHAN) You testified yesterday evening just before we closed, after I had asked you some questions about the time kept on the work in Washington, that that was all you had to do with contract 25; did you mean that absolutely? A. I should have implied that I intended that to mean regarding the movement of the workmen as turned over to

Mr. Pirie. As to putting them on particular work, I had nothing to do with that. Mr. Pirie attended to that throughout. As regards to making of the requisitions and getting the material, I did have something to do with that.

Q. Now, these were put in evidence yesterday subject to recall before we closed. As I recall it these requisitions are approved by you and were made out by you at the request of Mr. Pirie? A. Yes, sir.

Q. I think that is what you testified to yesterday? A. Yes, sir.

Q. Whenever he wanted material for the work? A. Yes, sir; if there was more material than we wanted to make requisition for, they advertised in the newspapers for it, which took some time. For instance, they advertised for locks; they inserted advertisements in the local papers and other papers; that was done by the office and I was not concerned with it.

Q. That was done with the large materials? A. Yes, sir.

Q. What was done with the requisitions after you made (762) them? A. I generally took a copy of them in a book and I sent the requisition up to the Library Office.

Q. Did you ever make a purchase without making out a requisition? A. Sometimes in what we would call an emergency case, but invariably after I got along or and and getting prices from dealers.

Q. Did you often do that? A. Invariably when that was done the requisition was made out that evening.

Q. Now, I believe you testified yesterday about some of these requisitions having other items on them than the ones for the finishing work and that in each case they are so designated? A. Yes, sir; they can be separated.

Q. That is when you put in a requisition for the materials. Did you have anything to do with the material itself when it came on the work? A. Some, yes.

Q. What material did you have anything to do with yourself? A. I can hardly define that, but the material that came there was counted or measured or weighed. In the case of iron it was measured and weighed. We measured it lengths and it was paid for by weight, the iron and steel.

Q. How about lumber? A. That was generally received and inspected by Mr. Ashley, the foreman carpenter, who had more time to do it than I had.

Q. He was the foreman carpenter on the whole job? A. Yes, sir; and he did not interest himself in the contract work on No. 25 contract.

(763) Q. Whenever there was any lumber work to be done under contract 25, who did that? A. Mr. Pirie would employ the carpenters; in regard to that the men that we had were

treated the same as if they were on a building where there was more than one contractor. If they wanted them on different parts of the work they would be dismissed from our pay roll and transferred to Mr. Pirie's roll, for instance, the time and checks all showing that on the roll. They would be discharged, as it were, from our roll for the time being.

Q. Who examined the iron and materials at that time, the steel and iron?

The WITNESS: Examined it in what respect?

Mr. McLANAHAN: When it came in in answer to these requisitions.

The WITNESS: As to quantity?

Mr. McLANAHAN: Yes.

A. Sometimes I would and sometimes Mr. Looker.

Q. Can you state any particular case when you examined it and when Mr. Looker examined it? A. Not from memory.

Q. Is there anybody that you know of who inspected all these tools and iron and can state about it? A. Mr. McNeill, the foreman blacksmith, measured the tools and he would count them, that is the cutting tools.

Q. What about the coke and coal? A. The coke would generally come in what we call a 60 bushel load. The wagon (7611) would be examined and measured and as the subsequent loads came in they were examined and compared with the other loads.

Q. Did you examine these loads? A. Mr. Looker generally attended to that to the weighing of the coal and coke and things of that sort. The first one or two loads of coke I did examine and I compared them with what we considered the designated quantity.

Q. There has been testimony here about payments to a certain Mr. Hauser, who had a team employed there—at least that is what the payments were for—on contract No. 25. Will you state what Mr. Hauser did, if you know, personally? A. Mr. Hauser furnished the team for removing the stones from the building to the other place where it would have otherwise been had it been brought there cut for setting in the building.

Q. Well, how was Mr. Hauser paid? A. For a two horse team, $5 a day, and for a four horse team $10 a day.

Q. He was paid by the day? A. Yes, sir.

Q. Who kept track of the time he worked on that contract? A. Mr. Pirie or Mr. Hagan would report that the team was present working on contract 25 that day.

Q. Who would they report that to? A. They would report to me in the evening.

Q. In the evening of each day? A. Yes, sir.

(765) Q. Was that a written or a verbal report? A. Sometimes a verbal report and sometimes a memoranda on a little piece of paper. If I was not in the office, if I was absent it was on a little piece of paper.

Q. What did you do? A. I would make a report at the end of each day of all material received that day including the time of the team.

Q. You would make a report at the end of each day of all the material which was received during that day and also including the time of this team? A. Yes, sir.

Q. Now, I notice on some of these reports quite a number of items—did you personally examine all the materials in these reports? A. No, sir.

Q. Where, then, did you get the data from that you put on here? A. From Mr. Looker, Mr. Hagan or Mr. Pirie or Mr. Titlow, if it was any pipe-fittings.

Q. Mr. Titlow examined the pipe-fittings? A. Yes, sir.

Q. Whose handwriting are these reports in? A. I could not say without seeing them.

Q. Will you look at the papers which I now hand you and state just what they are, if you can? Have you examined these papers recently? A. I have—I presume I have; they look like the same bunch.

Q. Will you look at them as quickly as you can and be sure that they are the same bunch of papers that you examined (766) recently? A. I see no others there than what I have examined recently.

Q. How recently? A. Within two days.

Q. Will you tell us what those papers are? A. Those are what we term the daily material reports as received at the building.

Q. And those reports include the material for the Museum work as you call it, that is outside of the work on contract 25, as well as the work on contract 25? A. Yes, sir; on separate sheets.

Q. Will you tell us which sheet shows the rest of the Museum work and which show the contract 25 material? A. On the 23rd of April, 1908, the large sheet shows that which was received pertaining to the building and the small one that pertains to the contract No. 25. As you may notice, my stamp on there is a personal stamp used instead of the stamp used on the building work.

Q. I notice in looking through these reports that there appear these small slips? A. Yes, sir; except in one case where

the small paper was rather too small to get on what was received and then we took the larger sheet.

Q. So in every case where these small sheets appear they were for work on contract No. 25? A. Yes, sir.

(767) Q. And they are so marked, are they? A. Yes, sir.

Q. Whose handwriting are these small sheets in? A. My own.

Q. Whose handwriting are the reports for the materials received on contract 25 in? A. I believe in my own.

Mr. McLANAHAN: We offer these papers in evidence. My brother wants them to go in subject to exception, I believe.

(It is hereby agreed that the original reports here referred to may be used in any court at the hearing or in argument in this case.)

Mr. HARLEY: Yes, if you please.

Q. (Mr. McLANAHAN) Will you kindly pick out the one sheet among these papers, if you can do so, where the report on contract 25 is on the larger sheet of paper which is a different form from the one which you usually used on that contract. Will you look at the sheet I now hand you and state if that is the sheet you referred to a moment ago? A. That is the one of April 25, 1908.

Q. That is the only one of which you have any recollection? A. That is the only one of which I have any recollection; it was the only one of which I know.

Q. You call these reports daily reports? A. Daily reports of material received.

Q. And when were they made up? A. Each day every evening.

Q. And they include on there the Hauser team? A. Yes, sir.

(768) Q. Will you pick one that has the Hauser team on it? A. Yes, sir: here (indicating) is an item for one day's use of team.

Q. That was on all of them? A. Yes, there was one occasion they had one day or one-half day's use of a four horse team. Some of the stones were unusually large and the two horses were unable to pull it.

Q. Could you, Mr. Freas, by looking through these daily reports, tell us from your personal recollection what materials were received on the work, personally?

The WITNESS: Received on the work of contract 25 or on the Museum work?

Mr. McLANAHAN: Yes, on the work of contract 25.

A. Yes, sir.

Q. Can you state whether or not from recollection—you say you have looked through all these reports? A. Yes, sir.

Q. Then, can you state whether or not all those materials mentioned in these daily reports were received? A. They were received, not absolutely from my own observation at the time of receiving, but from my own observation following, when I saw the goods there in use.

Q. In other words, you did not weigh or measure all the goods personally? A. No, sir.

Q. But you saw all of them afterwards? A. Yes, sir; I saw all of them afterwards, after they were received.

(769) Q. There were some items, I believe, on the vouchers, amounts paid to Mr. Hauser for hauling scrap stones? A. That was offal or scrap pitched off or broken off of the blocks in shaping them up. That would get in the workmen's way. Ordinarily in a commercial city like Baltimore, Philadelphia or Boston we could realize something from that scrap. We endeavored to obtain something for that in Washington. We sent around circulars or proposals, and there were no responses to that as I was informed. Then we endeavored to give it away and there was very little of that to be accomplished. So we had to haul it away so as to proceed with the work. It accumulated into heaps and hindered the men from working.

Q. Mr. Freas, have you looked over all the vouchers in this case, that is all the vouchers which pertain to the Graham contract No. 25? A. I believe I have.

Q. That is all of them except the pay roll vouchers. I do not believe you were asked to look at the pay roll vouchers? A. Yes, I believe I have.

Q. Now, of all those vouchers which you looked over, can you state whether or not there was anything included in those vouchers, any item which was not received on the contract No. 25?

Mr. HARLEY: Objected to, if your Honor please. It is too general.

The COURT: The objection is overruled.

To the propounding of which question, the defendants and each of them then and there objected; but the court overruled said objection and permitted the witness to answer the said question.

(770) Mr. HARLEY: We note exceptions, if your Honor, please.

A. I believe there are no vouchers in there—when I saw them the other evening there was some made out at the Library office, but we received the goods.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their twenty-ninth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Thirtieth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their thirtieth bill of exceptions, at the trial of this case, the plaintiff to prove the issues on its part, offered and produced evidence as follows:

Q. Then the goods mentioned in these vouchers you have received? A. Yes, sir; for material or labor or teams or whatever they call for.

Q. On what contract? A. Contract 25.

Q. I notice in the first five vouchers that money paid to Mr. Graham while he was working on this stone the signature (771) here of F. R. Freas, Master Mechanic. Will you look at these five vouchers and state whether or not that is your signature? A. That is my signature on No. 849. That is my signature on No. 866. That is my signature on No. 890. That is my signature on No. 940. That is my signature on No. 932, which constitute the five.

Q. Mr. Freas, while Mr. Graham was working on this stone in Baltimore what were your duties in connection with any stone sent from Mr. Graham's yard to Washington? A. When I would receive the invoice from the Library building I would generally check it up on the book which I kept with the stones scheduled in it. I had gone over that book and formulated the approximate cubical contents of each stone and I would compare it. If it differed from the cubical contents at the foot of the schedule or invoice, I would note it in red ink. On the first invoice, while there may have been a difference, I did not have the course plan in time to prepare my book schedule. Therefore you will find no red ink footing on that invoice.

Q. Here are the invoices which are already in evidence, from the first to the sixth load, which was sent over from Mr.

Graham's yard to Washington. Will you look at those invoices and state whether or not you have examined them? A. I have within the last two days.

Q. Then, look at these invoices and state whether or not that is the total of those received in Washington from Mr. Graham's yard while he was working on the contract over here, (772) that is the total of cut stone? A. I believe them so to be, without going through them and consuming time, in the regular numerical rotation, I believe them so to be.

Q. Will you look at the 69th load and state whose figures those are in red ink? A. The figures in red ink at the foot of the cubical column are mine.

Q. What do those figures stand for, the measurement at quarry cube or actual dimensions of the stone? A. The approximate dimensions as taken from the course plans. The actual dimensions would be the stone less the joint allowance as placed in the building.

Q. So that these dimensions at 33.21 as it is in this invoice show the dimensions of the stone as shown on the course plans? A. Yes, the approximate dimensions. When I asked for the book in which to make this Mr. Green told me not to go into it too particularly, so if a stone measured 3 feet, 7½ inches, I called it 3 feet 8 inches, and if it was 2 feet 7½ inches I called it 3 feet 7, giving and taking approximately.

Q. So you did not consider less than half an inch? A. No, sir; and having an allowance for the joints—

Q. Well, these figures were taken on that basis, then, from the course plans or setting plans? A. Yes, sir; setting plans.

Q. They were not taken at the quarry cube measure? A. No, sir.

Q. Then if a stone had a measurement of less than 12 inches (773) as you would take it at the actual measurement and not at 12 inches, is that right? A. If you will excuse me I will refer to the second schedule here (indicating). On the second schedule, B 15, is dimensioned on this schedule as 2 feet 6 by no feet 8 inches by 2 feet 0-3 inches. That is summed up in this schedule in black ink as having 5¼ cubic feet in it. According to my schedule I found that it did not agree, and I made a note and placed it to this invoice: "Note. Dimension of B 15 also several other stones do not hold the cub as per schedule. B 15 cubes 3-1 10 cubic feet according to my schedule which was taken at 8 inches."

Q. And it cubed at quarry cube at— A. (Interrupting): 5-1 12, a difference between the 12 inch computation and the 8 inch computation.

Q. What have you just testified as to the red ink figures on the 69th load applies to all the red ink figures on the rest

of these? A. Yes, sir; applies to all red ink figures wherever appearing here; yes, sir.

Q. How about that O. K. and the stamp F. R. Freas, were they put on there by you? A. Yes, sir.

Q. Now, will you just tell us again where you got the figures from directly that you made these calculations as to the actual number of cubic feet as shown on the setting plans?

The WITNESS: Excuse me, not actual, but approximate.

Mr. McLANAHAN: Well, approximate.

(771) A. From the course or setting plan.

Q. Did you get those figures directly from there? A. Yes, sir; in some cases I would not have the course or setting plans in advance of receiving the schedule, and therefore I would take the scale measurement given on the general plan which in those cases would exceed the dimensions as designated on the course plans as later received. In this case, my figures would sometimes but not very often exceed Mr. Price's figures.

Q. That happened in two instances, I believe? A. I could not say how many. It was in some but not very many.

Q. You say you are a builder? A. Yes, sir.

Q. And you have been in that business how long? A. Forty-two years, including my apprenticeship.

Q. Have you ever seen any setting plans like these were? A. Never before in my life, except on this building.

Q. Did you see any other plans except on this contract 25— A. Yes, sir; plans for the stone work for the courtyard.

Q. Who did that? A. Mr. Graham.

Q. Now, you said you kept a book with some of these measurements in? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Will you look at the book which I now hand you and (773) state whether or not that is the book to which you referred a few moments ago. A. That is the book to which I referred. It commences for the south pavilion on page 91. The preceding pages apply to other parts of the building with which Mr. Graham had nothing to do.

Q. What do these cross marks mean here in pencil? A. Simply that the stone marked there had been received; the blue mark states the day on which the last stone was received at the building.

Q. I noticed here the first column has the word "pier"; that applies to each page? A. The book was prepared for the regular pier system around the building and it was prepared

for that purpose, but the pier system did not apply in the south pavilion.

Q. The next column has the word "course"; that is the regular course? A. Yes, sir; commencing with A and going through the alphabet.

Q. And those correspond with the courses set forth on the contract drawings? A. Yes, sir.

Q. The next is the number, what does that mean? A. That designates the particular number of a stone in that particular course.

Q. The next is the length? A. Yes, sir; as you would perceive it latterly.

(776) A. And the bed? A. That is the depth of the wall.

Q. And the rise? A. That is the height.

Q. Of each particular stone? A. Yes, sir.

Q. And after that is the cubic feet? A. Yes, sir.

Q. And that is the cubic feet taken from the measurements on the course or setting plans except where you did not make allowance for joints.

Q. Or allowance for small fractions of an inch? A. Yes, sir.

Q. You did not take anything less than half an inch? A. Very seldom, if ever.

Q. And then there is the date? A. That means the date which the stone was received at the building and examined to see if the stone was in good order. Sometimes the stone might be delivered today but our men would not have the time to examine the stone and the boxes and make a report, and therefore the date there is the date that the stone was examined and certified to be in good order.

Q. Was it your business to certify as to that stone? A. As a rule; yes, sir.

Q. What happened as to the receiving of the stone after Mr. Graham quit work in Baltimore about the 7th of March? A. After that the stone was received as we had been previously doing. That which was shipped from Baltimore to here when the United States Marshal seized the yard and shipped it (777) on was generally received by Mr. Pirie, but the same arrangement was followed out.

Q. So that stone was not entered into this book until after it had been examined? A. Yes, sir.

Q. And you made those measurements here before the stone came?

The WITNESS: Does that refer to the column or to the ceilings?

Mr. McLANAHAN: To the columns.

A. The columns were all entered into that book before the stones came in.

Q. And when the stone came in you put this stamp on here as it was received and cut? A. Yes, sir; it was dated there when it was received and cut.

Q. On this outside margin (indicating)? A. Yes, sir.

Q. And you say that same thing applied after Mr. Pirie began cutting the stone in Washington? A. Yes, sir.

Q. And the only time it was entered in this book as finished was after it was actually cut? A. Mr. Pirie gave me the schedule showing it having been cut.

Q. You did not date it as having been received on the day that stone came down in the rough from the quarry? A. No, sir; I would check it there in the margin when it was (778) received from the quarry.

Q. When it was rough stock? A. Yes, sir.

Q. And the dates here show when it was finished? A. Yes, sir; you may observe in that margin in red ink the letter "S" showing that it was stock which was received or stock which was on the way and not finished stone.

Q. I notice this letter "S" on June 20, 1908? A. That means the stone was finished being cut on that day.

Q. And what does "S" mean? A. That means the rough stock was shipped.

Q. What does the "C" mean? A. That means the stone had been received in Mr. Graham's yard, some had work done on it and some had not. Some had just the boxes on them. Some cases had been half cut, others more than half cut and in other cases had no work done on them.

Q. And in those cases where the "H. C" is put down means the date when the stone was finally finished? A. Yes, sir; finally finished and ready for setting in the building.

Mr. McLANAHAN: If your Honor please, we offer this book in evidence, subject to exception of Mr. Harley, so that he can examine the book and look into it.

(It is hereby agreed that the original book here referred to may be used in any court at the hearing or in argument in this case.)

Q. (Mr. McLANAHAN) I notice on page 94, Mr. Freas, there are a number of corrections apparently. The black ink (779) is scratched through and the red ink is put there; what does that represent? A. I made it a point occasionally to make a memorandum or statement—not that Mr. Green directed it—but for my own information or his regarding the number of

stones received at the building, the number of stones on the way and the number of stones, according to my memorandum here, according to cubical contents, yet to be delivered. Along some time around the latter part of January, 1908, I believe I made such a statement and there seemed to be such a difference between the statement and the amount of money asked for that Mr. Green, I believe, after I had made the statement *though* I had made an error in my computation. He then asked me to revise it. I revised it and took the quarter inches and made the calculation and made the necessary corrections, as they appear there in red ink, but I did not take off the joint allowance even at that time.

Q. So as the book stands today with the red ink figures there they are taken with the actual dimensions shown on the setting plans except the joint allowance? A. Yes, sir; the quarter inches would often count in those red ink checkings.

Q. How much was the joint allowance? A. On the bed joint ½ inch, and on the vertical joint 3/16.

Q. That is the only thing not included in this account? A. That is right.

Q. And the cubic feet put here in the column are the cubic feet calculated as shown on the setting plan? A. On a (780) little closer basis than the former and to revise it if necessary from the former calculation.

Q. I notice you total each page at the foot? A. Yes, sir; not only myself but Mr. Looker checked me on those figures.

Mr. McLANAHAN: Gentlemen of the jury, this begins at page 91. (Handing book to jury).

Q. You say you made a statement to Mr. Green of the actual amount of stone cut by Mr. Graham and received by you at the building and the stone that was on the way, and so forth. Will you look at the paper which I now hand you and state whether or not this is the statement which you made to Mr. Green at that time? A. This is the subsequent statement. This is not the one given at first.

Q. This is the statement given before or after those corrections were made in that book? A. Before—after—after those corrections were made in that book.

Q. So the figures on this statement will show the corrected figures on that book, would they not? A. Yes sir.

Mr. McLANAHAN: We offer this in evidence. (reading): "February 7th, 1908, Mr. Bernard R. Green, Superintendent of Construction. Dear Sir: As my previous deduction of the

cube of the Sth. Pavilion granite seemed to be excessive as taken from the course plans to hand, I have again examined through all three course plans and give the result below.

(781) "The course plans in several cases do not give all the dimensions. I have resorted to scale measurements, although to do this from an isometric blue print is not very correct, and there may still be some misconception in the dimensions considered.

"Also in the absence of details of the moulded courses, some guess work had to be exercised to determine dimensions.

"There being no course plans of the ceiling of portico to hand, I have given this part no consideration further than to say that it may contain about 2,000 cu. ft. of an increase over the result herein noted.

"Total amount of cubic feet as considered, 62,768.53 cu. ft.

	cu. ft.	
Amount received up to this date,	22,210.85	
Amount shipped but not received,	487.08	
Total as shipped,		22,697.93
Amount yet to ship,		40,070.60

"Yours truly,

"F. R. FREAS,
Master Mechanic."

Q. Is this paper in your handwriting? A. It is.

Q. What is this item "Amount shipped but not received, 487.08?" A. That is the amount on the railroad.

Q. From Graham's yard to Washington? A. Yes, sir.

Q. The "Total as shipped, 22,697.93", that is shipped to you from Graham's yard at this date? A. Yes, sir.

Q. I notice here that you say that the ceiling of the portico (782) was not in here yet; why couldn't you have that in? A. We did not have the course plans or setting plans.

Q. They were not in on February 7, 1908? A. No, sir.

Q. There has been some testimony in this case there were some extras put in the work after it was completed, that the drum of the dome was enlarged and some extras were put in the wall. Were those dimensions or extras included in this? A. I was not aware that those extras had been inserted so I took it from the course plan.

Q. So this total here of 62,768.53 includes all the extras? A. I believe so.

Q. But it does not include the portico ceiling? A. No, sir.

Q. Now, as I understand you this total is taken from that book (indicating)? A. Yes, sir; which was taken from the course plans without any allowance for the joints.

Q. So leaving the allowance for joints out, this total would be the actual cubic feet taken from the course plans without the portico ceiling? A. Yes, sir; I so made it.

Q. Mr. Freas, I hand you the reports, which are in evidence, of the stone cut at the building under Mr. Pirie's direction, in Washington, on this contract No. 25, and I ask you whether or not the name stamped on each one, F. R. Freas, Master Mechanic, is your stamp or signature? A. It is, sir.

(783) Q. That shows the quarry cube measurement, does it not, on there? A. I believe so; when the stone was cut at the building I ceased putting on my red ink checks as there were no payments to be made on the account, as I considered there would be no further payments on the job until it was entirely completed.

Q. So on these reports you did not take the dimensions from your book and put them on in red ink? A. No, sir.

Q. You testified that after the stone was finished at the building you would stamp the date in the last column. Are these the reports from which you got that information (indicating)? A. Yes, sir; this is a report from which I got that day's information.

Q. Will you look at all of these and state whether or not all of the testimony which you gave as to this one (indicating), applies to all of them? A. I do not see my stamp on that one, but it applies if that stone was cut.

Q. What is that there (indicating)? A. Yes, that is it. It is stamped on back there, excuse me.

Q. Did you examine that stone after it was cut and see that the stone was actually cut as stated on these reports? A. Ofttimes.

Q. But you did not do it every time? A. No, sir; sometimes we would have the stone set in the building before we would get all of this statement. I recognize in those (indicating) that condition. In these, being statements from Mr. Pirie (784) regarding the work under progress which I could not certify, I find I have not endorsed or stamped.

Q. These are the summaries or statements? A. Yes, sir.

Q. And on those your name does not appear? A. That is right.

Q. I notice down under your signature here the date, May 23, 1908, and this report is dated May 23; what does that stamped date mean? A. That means the date I entered them up in the book from that list.

Q. That applies to all these reports from Mr. Pirie? A. Yes, sir.

Q. Are you at present in the Government employ? A. Yes, sir.

Q. You are in the Government's employ today? A. No, sir.

Mr. McLanahan: That is all, Mr. Harley.

Mr. Harley: If we may have the privilege of verifying this book, I think we can waive the cross examination of this witness.

The Court: Do you reserve the right to recall him?

Mr. Harley: I do not think we will need him. If it should appear that we do, I will make application to your Honor later. All we would like to do is to go over this book (785) and see if he has made any serious mistake.

Vernon H. Hagan, a witness of full age, having been duly sworn, testified as follows:

Direct Examination.

Q. (Mr. McLanahan) Mr. Hagan, will you tell us just what your employment is, sir? A. I am a clerk in Mr. Green's office at the Library, at present.

Q. Mr. Bernard R. Green's office? A. Yes, sir.

Q. And what was your employment from March, 1907, through the spring of 1908—rather, I mean from March, 1908, to 1909? A. I was timekeeper on the Graham contract.

Q. Did you have any work outside of the work on the Graham contract to do?

The Witness: At that time?

Mr. McLanahan: Yes, at that time.

A. Not very much, sir. I worked at the Library in the morning.

Q. In the morning? A. Yes, sir.

Q. And you gave the afternoon to the timekeeping? A. Yes, sir, and part of the morning too, at the Library.

Q. Mr. Freas testified that in the afternoon you would go around among the workmen and see whether or not they were at work and that you kept a little book which you would check up and which he called your field book, is that correct? A. Yes, sir.

Q. Have you that book? A. No, sir, I have not.

(786) Q. Just wait a moment and I will get that. In the mean time, tell us what time in the afternoon you went around? A. I would start out about half past one or two o'clock.

Q. And what did you do? A. I would go out where the men were cutting stone and check their time.

Q. What did you do after you saw whether or not they were working? A. I took the book to the office and checked it up with the gate roll, if they were present I used a cross mark and if they were not I used the dot. Or when they were absent I would go around again and see whether I had missed them the first time.

Q. Did you make those entries correctly in that field book of yours? A. Yes, sir.

Q. After you had made these entries correctly in the field book, what did you do? A. I took the book to the office and checked it up with the gate roll.

Q. Are these (indicating) the gate rolls? A. Yes, sir.

Q. Do those gate rolls show the time on all the work around the building or only on the Graham work, contract No. 25? A. Only on contract No. 25.

Q. Did you take up the time of the work for the other men on that job, on the other work excepting contract 25? A.

(787) No, sir.

Q. After you checked this up with the gate rolls, what did you do then? A. I would enter it on another book.

Q. Will you state what these books are which I now hand you? A. Those are the field books which I used in checking the men.

(It is hereby agreed that the original field books here referred to may be used in any court at the hearing or in argument in this case.)

Q. Those are the field books which you referred to a moment ago in your testimony, are they not A. Yes, sir.

Q. When you checked up the field book with the gate roll, suppose you found man appeared as working on the gate roll but was not on the field book, what happened to him? A. I would go out again and see if he was working, and I would see if I had missed him.

Q. And if you found that you had not missed him, and that he was not there?

The WITNESS: And his name was on the gate roll as present?

Mr. McLANAHN: Yes.

A. Then I would take it up with Mr. Looker or Mr. Freas.

Q. And suppose it was found that he was absent? A. Then we marked him absent.

Q. On both? A. Yes, sir.

Q. Each day how did the gate roll compare with the field
(788) book? A. It was all right, it always checked up.

Q. You always saw at the end of each day that the books corresponded with the gate rolls? A. Yes, sir.

Q. And you say you would then enter the time from the gate roll on the small time book which you called the Library time book? A. Yes, sir.

Q. Will you state what these books are which I now hand you? A. They are what we call the Library time books.

Mr. McLANAHAN: I offer in evidence Mr. Hagan's field books which will come in subject to exception. The books put in evidence yesterday were these small Library time books.

(It is hereby agreed that the original sealed books here referred to may be used in any court at the hearing or in argument in this case.)

Q. Now, you say you entered from the gate roll the time on these small Library time books? A. Yes, sir.

Q. Did you make those entries? A. Yes, sir.

Q. Can you state whether or not they were correctly made in those small Library time books? A. Yes, sir.

Q. What were done with them then? A. After I checked it back I put the gate roll and the books on Mr. Freas' desk for him to check.

Q. You put the books and the gate roll on Mr. Freas'
(789) desk for him to check, with the small Library book? A. Yes, sir.

Q. Then what was done? A. After he checked them he sent the small books to the Library.

Q. By mail or messenger or how? A. By mail, generally.

Q. And then what was done at the Library? A. In the morning I would receive these books and enter them up in the large Library time book.

Q. Will you look at the books which I now hand you and state what these books are? A. These are the large Library time books.

Q. And you made the entry from the small Library time book into the large Library time book, did you? A. Yes, sir.

Q. Were they correctly made? A. Yes, sir.

Mr. McLANAHAN: We offer these large Library time books in evidence. I suppose they can come in subject to exception.

(It is hereby agreed that the original large Library time books here referred to may be used in any court at the hearing or in argument in this case.)

Mr. Harley: Yes, sir; until we have an opportunity to see them.

Q. (Mr. McLanahan) After the time was put in these large Library time books what was the next step in calculating the time and the amount of money to be paid as wages, (790) &c.? A. On the 15th and 30th, the last of the month, we would total up the time in the large book and figure out the amount of money and also in this book (indicating) and check the amount, that is, check the one book against the other.

Q. Did you do any of that totaling up yourself? A. Yes, sir.

Q. All of it? A. No, sir; but a great deal of it.

Q. Were you present when the two books were checked up? A. As a general thing; yes, sir.

Q. Were you always there? A. Yes, sir; I think so.

Q. You cannot be absolutely certain whether you were always there? A. No, sir.

Q. Who made up the pay roll? A. The stenographer.

Q. What was her name? A. Miss Schansten.

Q. She made it up from where? A. From this large book (indicating).

Q. And then it was checked up with the small book? A. Yes, sir.

Q. But you cannot state whether you were always there personally when they were made up? A. No, sir.

Q. Did you write any of those entries of the names on the gate roll there—is any of that in your writing? A. Yes, (791) sir.

Q. Who else wrote some on there, that is, the names? Do you recognize any other handwriting? A. Mr. Looker's and a few of Mr. Freas'.

Q. After the pay roll was made up did you ever personally see that the pay roll corresponded with either one or both of these time books or with the gate rolls? A. Yes, sir.

Q. Which one did it correspond with? A. The amount corresponded with that in the large book. This book and that book (indicating) were checked with the amounts and then the roll was checked up with the large book.

Q. Can you state whether or not, personally, they always tallied? A. Yes, sir; they did.

Q. You can state that yourself? A. Yes, sir.

Q. Have you looked through the pay rolls on the Graham work which were offered in evidence in this case? A. Yes, sir.

Q. Can you state whether or not the time and the names of the men as shown on those pay rolls are correct, as compared with the gate roll and time books?

Mr. HARLEY: Objected to; it is too general, if your Honor please.

The COURT: I overrule the objection.

To the propounding of which question the defendants and each of them then and there objected; but the court overruled (792) said objection and permitted the witness to answer said question.

Mr. HARLEY: We note exceptions.

A. They are correct.

To which action of the court in overruling the defendants' objection to said question and in permitting the witness to answer the same, the defendants and each of them then and there excepted and prayed the court to sign and seal this, their thirtieth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Thirty-first Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their thirty-first bill of exceptions, at the trial of this case, the plaintiff, to prove the issues on its part, offered and produced evidence as follows:

Q. Now, after the pay rolls were all made up, what did you do with those pay rolls? A. I took them down to the building on pay day and signed up all the men.

Q. What do you mean by singing up all the men? A. Signed the names to the pay roll.

Q. You signed them A. Yes, sir.

Q. You signed their names? A. I was there and I check- (793) ed them up; they signed their own names.

Q. Did you see each man sign his name? A. Yes, sir.

Q. Will you state if those are the pay rolls (indicating) which you refer to, and if those are the men's names on there

which you saw put on there by those men? A. They are the pay rolls, sir, but there are some few cases in here where I did not see the men sign.

Q. Can you point out those cases? A. Yes, sir; on the last sheet we generally keep the names of the Government employes on the contract. They were signed by the foreman.

Q. They were signed up by the foreman? A. Yes, sir.

Q. And you signed up all the regular men? A. Yes, sir; but in some few cases I did not do that.

Q. But I understand that in almost every case you saw the regular men employed on No. 25 contract sign up? A. Yes, sir.

Q. But you did not see the men who were borrowed from the Government work temporarily? A. No, sir.

Q. Do you know who did see those? A. Mr. McDonald.

Q. You said there were a few instances where you did not see the men employed regularly sign up? A. There is one (in-
(794) dicating); he was not there that day and he came up to the Library and got his money and it was signed by Mr. Rabbit.

Q. That is Gress Jones, as I make it out? A. Yes, sir; and this (indicating) is another one, Norman Sampson; the witness to his name was Mr. Zirckle.

Q. Mr. Zirckle? A. Yes, that was signed at the Library when I was not there. Here (indicating) is another one that Mr. Rabbit signed at the Library. This was witnessed by Mr. Addie, in going around signing these, and I did not see the men; Mr. Addie would return with this and sign the men up himself.

Q. Who was Mr. Addie? A. He was the draughtsman on this contract.

Q. How many are on this pay roll which you did not see sign, that is, regular Graham men, men who worked under the Graham contract regularly? A. There are about 26 on that one (indicating).

Q. How many were on each of the other rolls that you had here so far, where you found anything like that? A. I think there were only one or two.

Q. Just go ahead and look through them and tell us how many there were on each roll which you did not see signed for actually? A. There are 12 on that one (indicating).

Q. And where nothing appears on the margin here (indicating) those are the ones which you saw signed? A. Yes, sir.

Q. It is only when some name appears there that some one
(795) else saw it signed? A. Yes, sir; there is one on that one (indicating).

Q. And sometimes your name appears there in the margin; what does that mean? A. Well, the man could not sign his own name and I would sign for him. There is another one on that one (indicating).

Mr. McLANAHAN: Just state the numbers of the vouchers as you go along.

A. (continuing) Now, this is voucher No. 1,733 and there are none on that one.

Q. None on No. 1,733? A. No, sir.

Q. What is the number of the next? A. Voucher No. 1,740; there is one on this one, on the regular roll.

Q. One on the regular roll? A. Yes, sir?

Q. Where did the Government workmen appear, that is the ones who were borrowed from the Government? A. On the last sheet.

Q. And those you did not, as a rule, sign up? A. Not as a rule; no, sir. This (indicating) is No. 1,793, there are none on that one. No. 1,836; there are two on that one No. 1,856; there are none on that one. This roll is the regular Government roll, there are only two or three items on there charged to Graham.

Q. This is the regular Government roll No. 1,868 with only two or three items charged to Graham? A. Yes, sir. (796) No. 1,869; there are none on that one. This is No. 1,899 and it is the regular Government roll. There is one name charged to Mr. Graham.

Q. You did not see him sign? A. No. The next is No. 1,900 and there is one on that one.

Q. No. 1,900 is a Graham roll? A. Yes, sir. No. 1,953 is a regular Government roll and there is one item charged to Mr. Graham's contract.

Q. You did not see him sign that? A. No, sir. No. 1,954 contains one.

Q. Is that also a Graham roll? A. Yes, sir.

Q. There is only one that you did not see the man sign? A. That is right, only one. 1,989, there are none on that one.

Q. That is a Graham roll, is it not? A. That is a Graham roll. No. 2,036, there is only one on that one. 2,081, there are none on that one. 2,101, there are none on that one. The last roll, No. 2,144, I do not believe I witnessed that roll. There are only about nine names on there, but I do not think that I went to the building at all that day.

Q. Do you know who did go down with that? A. I could not say. Mr. Sheehy, I think, but I am not sure of that.

Q. The list there with the nine names on you say you did not see yourself? A. Yes, sir.

Q. Who actually paid the men, Mr. Hagan, after they (797) signed up the roll, if you know. Who gave them their envelopes? A. Mr. Sheehy, I believe. They were paid at Mr. Freas' office.

Q. Mr. Sheehy was the chief paymaster, was he? A. Yes, sir; at the last part of the job I paid them off myself at the other office, Mr. Piric's office.

Q. About how many pay rolls did you pay off yourself, if you can state, approximately? A. I cannot state exactly; but for the last three months, I should think, that is, all but the last roll there (indicating).

Q. How did the money get in the pay envelopes, if you know, who put it in there? A. It was put in at the Library.

Q. Did you have anything to do with the putting of it in there? A. Not with Graham's money; no sir.

Q. You did not have anything to do with the Graham money? A. No, sir.

Q. Who did that, if you know? A. It was put in there by Miss Schauster and Mr. Bond, I believe he helped. I do not remember now of any one else.

Q. Mr. Hagan, if you know, will you tell us who kept track of the time of the men who were regularly employed by the Government but who were borrowed from time to time and put on the Graham work? Who kept track of the men who were borrowed and worked on the Graham work? A. Well, (798) the foreman of these men, and I checked that myself.

Q. You checked them yourself? A. Yes, sir; with the foreman.

Q. And you made that in your report there, did you A. Yes, sir; that is on the last sheet of the pay roll.

Q. You put it on the last sheet of the payroll every two weeks? A. Every two weeks on the pay roll.

Q. And you put that down every day, the amount of work those men were doing there? A. Yes, sir.

Q. Did you ever make any mistakes that you know of, that Mr. Graham was charged with work that was not done on account of this contract? Did that ever happen that you know of? A. I don't remember of any. We always checked up that broken time—as we called it—with Mr. Looker so that one man would not get more than one day's time, eight hours. We checked it up that way.

Q. Did you have anything to do with the materials received there? A. No, sir.

Q. How about this team of Mr. Houser's for collecting that scrap and handling stone around the building, did you keep track of that time? A. I did; I got that from Mr. McDonald.

Q. Where did you keep that? A. I kept that in the back of the book and I made a report of that to Mr. Freas, the master mechanic.

Q. That report was made by you to Mr. Freas? A. Yes,
(799) sir.

Q. And you got the report as to the exact amount of time that the team worked on the building from Mr. McDonald, you say? A. Yes, sir.

Q. Mr. Hagan, there has been offered in evidence here a letter from Mr. Graham to Mr. Green dated December 18, 1907, which encloses a statement showing the weight in pounds per cubic foot on certain carloads. Mr. Graham says in that letter as follows: (reading). Now that list is appended here and is a separate list, as I understand it, from the other list which I hand you. Will you look at this statement of cars where the freight ran over 40 cents as stated in this letter which I have just referred to, and say whether or not you have made any calculations based on that statement as to the average pounds per cubic foot that the stones on the cars mentioned in this statement had on them? A. I have, yes, sir.

Q. Will you look at the paper which I now hand you and state just what it is? A. This is a copy of this report here.

Q. Is that a correct copy of that report? A. Yes, sir; it is.

Q. Does each car shown on this statement appear there? A. Yes, sir; it does.

Q. Does each number of cubic feet shown on this statement appear there? A. Yes, sir.

(800) Q. Does each pound? A. Yes, sir.

Q. Have you made any calculations on that sheet? A. Yes, sir.

Q. Showing what the average weight on all these cars in Mr. Graham's statement is per cubic foot of finished stone? If so, state what that average is? A. I figured the average at 236.

Q. Pounds is that? A. Yes, sir; pounds per cubic foot.

Q. 236 pounds per cubic foot A. Yes, sir.

Q. Is the average of the whole thing as shown on Mr. Graham's statement of the over-weights? A. Yes, sir.

Q. Do you know whether or not his statement includes any cars where the average was under 40 cents per cubic foot? I think his letter states that. I don't know whether you know that personally or not? A. I do not know that.

JOHN MCDONALD, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. MCLANAHAN) What is your occupation? A. Master rigger.

(801) Q. And by whom are you employed? A. Bernard R. Green.

Q. In whose employ were you from March 1, 1908, until the spring of 1909? A. Bernard R. Green's.

Q. He is what? A. The Superintendent of Construction.

Q. You were employed on the Government work, were you? A. Yes, sir; on the Government work.

Q. Where was your employment during the spring of 1908, that is, from March in 1908 until 1909? A. On the new building for the National Museum.

Q. Were you employed during all of this time on Contract No. 25, Mr. Graham's contract? A. No, sir.

Q. About how much of this time were you at work on the Graham contract, No. 25? A. But very little.

Q. Do you remember just when you were employed then? A. I don't remember just the date, but I was employed in putting up the derricks and in overseeing them.

Q. Was that before they began to cut stone for Contract No. 25 in Washington? A. Before and after.

Q. You also had charge of taking it down, did you not? A. Yes, taking it down.

Q. What was your duty with regard to the Government men working under you who were used on the Graham contract (802) part of the time, as to the signing of the pay rolls by them? A. Well, I would witness their signatures on the pay rolls on Contract 25.

Q. So that whenever any Government men who worked under you on Contract 25 were paid off, you would witness their signature on those pay rolls? A. Yes, sir.

Q. Have you looked through those pay rolls? A. Yes, sir; some of them. I did not have a chance to look through them all.

Q. Can you look through them quickly and pick out the Government men that you saw sign those pay rolls? Here is a rigger (indicating) and a laborer here? A. They are all for Mr. Graham. This one here, Joseph Turner, is one.

Q. That is the first one which you find? A. Yes, sir.

Q. Are there any more? Look at invoice No. 1,793; there is Mr. Blankenhorn's name there. Is he a Government man? A. Yes, sir; Titlow is a Government man but not under me.

Q. How about any of the others there? A. King—I don't remember the others; I don't remember if King was under me or not.

Mr. McLANAHAN: I think you will find the Government men on the back page there as a rule. It may save a little time if you will look there.

The WITNESS: I thought you wanted me to pick out the names of the Government men that I had witnessed.

(803) Mr. McLANAHAN: I do.

The WITNESS: Well, there are some whose names I signed. There are some who could not sign their names.

Mr. McLANAHAN: I want any of them under you whose signatures you saw signed or did sign.

The WITNESS: That is all my men on the roll.

Mr. McLANAHAN: Yes.

A. Here is one, Quarles.

Q. That is on voucher No. 1,869? A. Yes, sir; this is my name here.

Q. That is the second half of December, 1908; how much did you work on the Graham contract, can you tell that from that roll? They have you down there for 15 days. Do you remember what you did there? A. Putting up the derricks.

Q. Now this is December, 1908, didn't you get the derricks before that? A. Yes, sir; in April.

Q. Then that could not be that work. Do you know what this was for? A. It was going around the work and overseeing the derricks, &c.

Q. And Blankenhorn is one man? A. Yes, sir.

Q. And Dusterhoff is another? A. Yes, sir.

Q. What is this name? A. George Amiss.

(804) Q. Was he one of your men? A. Yes, sir; he was.

Q. How about H. S. Phelps? A. Yes, sir.

Q. He was one of your men? A. Yes, sir.

Q. And S. Marvel? A. Yes, he was one of my men, an engineer, and E. J. Gould.

Q. What was he? A. A blacksmith.

Q. And Gilvrey? A. Yes, sir; he was an engineer.

Q. You have said, I believe, that you saw to it that the men who were under you, that is, the Government men who

worked on the Graham contract, signed these pay rolls? A. Yes, sir.

Q. Did you know when the men under your employ—when their time was charged to the Graham work, did you so know about it? A. Each evening.

Q. Whom did you make report to each evening? A. Mr. Hagan.

Q. You made report to Mr. Hagan each evening of the time your men were working on the Graham job, is that it? A. Yes, sir.

Q. What did you do with the stone when it came in the yard? A. I had the unloading of it.

Q. You handled the unloading of it? A. Yes, sir.

(805) Q. That was all the stone both on the Graham work and on the other, was it not? A. No, Mr. Pirie had men unloading some of the stone, that is, Mr. Pirie and I had men there unloading also.

Q. And did your men unload on some of the Graham work? A. Yes, sir.

Q. To whom was that charged up? A. To Contract 25.

Q. You mean by the unloading of the stone the unloading of the finished stone as it came from Mr. Graham's yard, or the rough stone as it came from Bethel, Vermont? A. The rough stone and the finished stone.

Q. Both? A. Yes, sir.

Q. Did you have anything to do with the derricks? A. Yes, sir; I had the putting up of the derricks and the taking down of them.

Q. How many derricks were used on Mr. Graham's work? A. Two.

Q. Were they used for any other work too at the same time? A. No, sir; no other work but the Graham work.

Q. Did you personally see these derricks on the work? A. Yes, sir.

Q. Did you have anything to do with the getting them there? A. Yes, sir.

Q. What did you have to do with that? A. I was sent out by Mr. Green, Superintendent of the work, to rent one (806) or two derricks and I could only rent one derrick in the whole city of Washington and the other derrick I bought the timber for and frame for.

Q. You hired one? A. Yes, sir; from the George A. Fuller Company.

Q. How about the engines for these derricks? A. I hired the engines from the George A. Fuller Company.

Q. Were those engines used there on the work? A. Yes, sir; until such time as the stones on the Graham contract were all cut and handled.

Q. Then what did you do with the derrick that you hired after the work was done, what was done then with the derrick which you had hired? A. It was sent back to the George A. Fuller Company.

Q. What did you do with the derrick that you bought and set up yourself? A. That is still there on the grounds.

Q. Stored there on the grounds? A. Yes, sir.

Q. How about the engines that you got from the Fuller Company? A. Those were sent back.

Q. After the work was over? A. Yes, sir.

Q. Did you have charge of the engines while the work was going on the Graham contract? A. I did.

(807) Q. Did you have charge of the men who were working on these engines? A. I did.

Q. How about the coal and the coke used for those engines, did you have anything to do with that? A. I would order it through Mr. Freas and Mr. Hagan or Mr. Looker.

Q. What would you do? A. I would ask them to order some coal or coke, whichever it may be.

Q. Did you tell them how much to order or did you indicate to them about how much you needed? A. About 120 bushels.

Q. Did you always order 120 bushels? A. Yes, sir; about 120 at a time.

Q. How long did that last you? A. Sometimes a week, it depended on the amount of work we were doing with the derricks.

Q. Where was that coal and coke used? A. Used in the engines working on the Graham contract.

Q. Was any of it used in the engines for the compressor? A. Yes, some of the coal.

Q. You did not use coke in the compressor engine? A. No, sir.

Q. Why did you sometimes use coal and sometimes coke? A. The coal made so much dirt that we preferred to use coke near the building, but when the engines were off from the building we used coal.

(808) Q. Do you know about the tools that were used on the Graham work, were they stamped in any way different from the tools used on the Government work? A. They were stamped "G."

Q. Why were they so stamped? A. To be kept separate.

Q. We had some testimony as to the Houser team which did the hauling around the work; who actually saw, if you know, as to Mr. Houser's team doing that work and putting in that time? A. Well, when he was working for the Government, for me, I looked after it, but when he was working for Mr. Pirie he looked after it.

Q. You only took charge of it when he was doing the Government's part of the work? A. Yes, sir.

JAMES A. BAILEY, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. McLANAHAN) Mr. Bailey, what is your occupation at present? A. I am now in the city's employment, at Richmond, Virginia.

Q. What kind of work? A. New sewer work.

Q. What is your duty there? A. Looking after the construction of the sewers.

Q. Have you anything to do with the stonework there? (809) A. No.

Q. What is your regular business? A. Granite cutting.

Q. How long have you been in that business? A. A little over 40 years.

Q. And where have you had experience in granite cutting? A. In Richmond, Virginia; Columbia, South Carolina; Westerly, Rhode Island; Concord, New Hampshire; Northfield, Vermont; Worcester—

Q. Have you ever been here in Baltimore? A. Yes, sir, I served my time here.

Q. Have you worked on any of the buildings around here since you served your time here? A. Worked on this building across the street (indicating).

Q. How about the new Custom House? A. Yes, sir; also on the new Custom House—I was at Guilford, Maryland.

Q. What were your duties there? A. Foreman.

Q. Foreman on the cutting of the granite for the new Custom House? A. Yes, sir.

Q. Mr. Bailey, where were you employed, or by whom were you employed, during the fall of 1906 and during all of 1907 and 1908 and the first part of 1909? A. With Bernard R. Green.

Q. On what work? A. The Museum work.

(810) Q. On the Museum work? A. Yes.

Q. And where were you employed during that time? A. Northfield, Vermont, and Bethel, Vermont.

Q. Will you speak a little louder so the gentlemen of the jury can hear you? A. Northfield, Vermont, and Bethel, Vermont.

Q. What were you doing at Northfield? A. Looking after the cutting of the stone for the National Museum Building, the superstructure.

Q. That was the stone that did not come to part C, that stone was not used on the South pavilion of the building? A.

No, sir, that stone that was cut up there was used for the main building.

Q. Who had charge of the cutting of that stone at Northfield, Vermont? A. The Thompson-Starrett Co.

Q. You had charge during the fall of 1906 of watching that stone? A. Yes, sir.

Q. When did you have anything to do with the stone at Bethel, Vermont? A. After the contract was let.

Q. That is the contract for the South Pavilion, Mr. Graham's contract? A. It was.

Q. What is there at Bethel that you had charge of? A. The quarrying was done at Bethel and the cutting was done
(811) at Northfield.

Q. The quarrying for both the cutting they were doing at Northfield and the cutting Mr. Graham did at Baltimore was done at Bethel? A. That is right.

Q. When did you first go to Bethel? A. When was my first trip there?

Q. Yes. A. In October.

Q. 1906? A. Yes.

Q. Was it early or late in October? A. It was the early part of October, if I remember right, that I went there.

Q. And that was before the contract was given out? A. It was.

Q. Can you tell us when it was that you went there again, roughly speaking? A. I think I went there the early part of January.

Q. When did you go there to stay, permanently, if at all? A. That was in September, 1907.

Q. Between January, 1907, and September, 1907, how often did you go to Bethel, if at all, just roughly speaking? A. Well, there were two months duration, I think between one of my trips and another in the spring.

Q. Outside of that two months how were your trips to Bethel? A. About three or four times a month for the next two or three months.

(812) Q. Three or four times a month? A. Yes, and then about once a week, you might say, for the next two or three months and then from that time on about three or four times a week.

Q. You were making those trips back and forth until December when you went up there to live? A. I was.

Q. To stay there permanently? A. Yes.

Q. And that was in September, 1907? A. Yes.

Q. Can you tell us whether or not those quarries are located in Bethel, Vermont, that the stone came from for the South Pavilion? A. It was my impression that it was in Bethel.

Q. From where did you get that impression? A. Well, I saw the officers come up there to arrest the men from the village of Bethel, and saw the tax collector up there to collect the taxes and I understood while I was up there that it was part of the township of Bethel.

Q. I have here a map of Bethel but it doesn't state just what Bethel, apparently. Will you look at that map and state whether or not that is the map of the Bethel where you were? A. That is the Bethel.

Q. Where the quarry was? A. Yes.

Q. Can you point out on that map there where the quarry (813) is located, approximately? A. There it is there (indicating).

Q. Where it is marked "granite quarry"? A. Yes.

Q. I notice down here "Bethel Post Office"? A. That is the Post Office in Nethel.

Q. There is a village there? A. Yes.

Q. This Bethel covers a good deal of territory altogether, does it not? A. It is the Bethel township.

Q. This up here is East Bethel? A. That is East Bethel and it is across from the quarry. One or two of the men lived in East Bethel.

Q. That is another village, is it? A. Yes, I think so, but I have never been over in East Bethel.

Q. The granite quarry that you pointed out doesn't appear to be on any railroad, at least there appears to be no spur from that quarry. Do you know when the spur was built? A. It was built before I went there.

Q. Do you know how long? A. I do not.

Q. There was a spur built over to the regular line of the railroad from the quarry? A. It come around this way (indicating) and back in here.

Q. Around that hill? A. There is the switch in there (indicating). It would be about in here.

(814) Q. Where does it connect with the main line? A. This is the main line (indicating) and this spur come down here to the Bethel Post Office and connected right along so.

Q. Do you know whether or not all this country comprising this map here is known up there as Bethel, Vermont? A. I so understood it; to my knowledge I do not know.

Mr. McLANAHAN: If your Honor please, we offer this map of Bethel in evidence; if your Honor please, we offer in evidence the Charter of Bethel as recorded in "Charters granted by the State of Vermont." Volume 1, pages 1, 2 and 3, in evidence in this case. We offer this whole charter. It shows that Bethel—first of all, the Incorporators of the town of Bethel, and then the limits of the town or township. In one

place it is called a town and in another place a township in this Charter, and it is shown that the limits, by measurement, are by admeasurement 23,060 acres to be divided into 52 equal shares, and that the same be and is hereby incorporated into a township by the name of Bethel and the inhabitants that do or shall hereafter inhabit said township are declared to be infranchised and entitled to all the privileges and immunities that other towns within this state do by law exercise and enjoy—

(It is hereby agreed that the said original map and charter here referred to may be used in any court at the hearing or in argument in this case.)

The COURT: Does that agree with the map?

Mr. McLANAHAN: I think so. I do not know that I exactly compared them myself. This is certified to by the Secretary of the State of Vermont as being the Charter of Bethel, Vermont. "Witness my signature and seal of this office, at (815) Montpelier, this 31st day of May, one thousand nine hundred and ten. Guy W. Bailey, Secretary of State." He is not related to you? A. No, sir.

Q. Secretary of the State of Vermont, and he has the seal of Vermont on here. Will you tell us just what you know about those photographs that I now hand you, just what they are, if you know what they are and how you know it? A. They are photographs of the Bethel quarry.

Q. How do you know they are? A. I saw the man when he took them.

Q. Where did you get those photographs, if you did get them? A. I bought them from the photographer and sent them to Mr. Green at the time.

Q. Can you, by looking at them, say whether or not that is the Bethel quarry? A. I can.

Q. You know they are correct, do you? A. I do. I saw the man take them.

Mr. McLANAHAN: We offer the three photographs in evidence.

(It is hereby agreed that the said three original photographs here referred to may be used in any court at the hearing or in argument in this case.)

Q. About what date was it that those photographs were taken if you know? A. I think it was in the fall of 1907; I cannot say the date.

(816) Q. But it was in the fall of 1907? A. Yes, sir.

Q. After you went over to the Bethel quarry in September, 1907, to live there regularly, how long did you stay there? A. Until July.

Q. July, 1908? A. Yes, sir.

Q. At that time had all the stone been quarried for the South Pavilion under the Graham contract? A. In July, 1908, yes, sir.

Q. It had been quarried up to July, 1908? A. Yes, sir.

Q. Now, what was your duty, or what were your duties in connection with the Bethel quarry, while you were making these trips over there during the year of 1907, and after you went there permanently in the fall of 1907; what did you have to do there? A. To inspect the stone after it was quarried to see that it was gotten out properly and shipped on the car—not exactly that it was shipped on the car but to see that it was properly gotten out for the Graham contract.

Q. And you signed these invoices which have been offered in this case, did you not? A. I did.

Q. You have looked over those invoices, have you not? A. I have—

Q. The ones that have been offered in evidence? A. No, not since I signed them.

(817) Q. Look over them.

Mr. Hill: If your Honor please, with the permission of my brother, we will withdraw this witness for five or ten minutes until Mr. Rabbitt, who is here from Washington, testifies to one or two points, so he can go right back.

The Court: Very well.

(Witness suspended.)

Wade H. Rabbitt, a witness of full age, having been duly sworn, testified as follows:

Direct Examination.

By Mr. McLanahan:

Q. Your name is W. H. Rabbitt? A. It is.

Q. Where are you employed? A. At the Library of Congress in Washington.

Q. Under whom? A. Under Bernard R. Green, Superintendent of the building.

Q. And in whose employ were you during the spring of 1908 and during 1909, the spring of that year? A. I was in the same position I hold now.

Q. You held the same position? A. Yes.

Q. Did you have anything to do with this contract No. 25, this Graham contract, finishing up the Graham contract for this work on the South Pavilion? A. I had.

(818) Q. What did you do? A. I assisted in some of the clerical duties, in comparing the pay rolls after they had been transcribed from the time books, and making up the money schedules on which the money was drawn from the Treasury Department, sometimes counting the money out into the envelopes and going with the Chief Clerk on the Museum work a half dozen or more times to the site of the Museum building to pay off and distribute the money to the men on the Graham contract.

Q. And who was in charge of making up those pay rolls and giving the money out? A. Why, Mr. Shechy, the Chief Clerk, was in direct charge of that.

Q. He had charge of that? A. Yes, sir.

Q. He had charge of the actual payment of the men? A. He did.

Q. Who did? A. Why, Mr. Shechy, did, as a rule. I assisted him when it appeared that the bulk of the money was most too much for one man to handle, and that it would be necessary to carry two bags to the building, I would go along and carry one and as a rule distribute the money to the men on the Graham work.

Q. You made some of the actual payments of the money to the men yourself, is that so? A. It is.

Q. Did you make any payments to any men who came to the office for their money between pay days? A. Well, now,

(819) I cannot say that I did.

Q. Your name appears on some of these—at least the name of Mr. Rabbitt appears on some of these rolls. Can you state whether or not that is your signature? A. If I saw it, probably I could.

Q. Will you look at them? A. These are the rolls.

Q. Have you looked at them? A. I have not; no, sir.

Q. On this first one here is W. H. Rabbitt, is that your signature? A. Yes, that is my signature.

Q. Where did you make up those schedules for the money from the Treasury Department? A. Those schedules were made up in the office there at the Library of Congress.

Q. Did you make them up? A. A great many of them.

Q. What did you make them up from? A. From the pay rolls.

Q. These (indicating the pay rolls)? A. From these pay rolls and they were taken out and approved after being compared.

Q. What could you say as to the schedules which you made up as to comparing them with the pay rolls after you made them up, were they the same? A. They were always correct.

Q. Did you ever go over them to see whether or not they (820) were correct? A. Yes, sir, by checking the schedule with the total of the pay rolls.

Q. Checking the schedule total with the pay roll total? A. That is right.

Q. Then what did you do with that schedule? A. Why, it was used while the operation of putting up the money was in progress, and after that it was left at the office as a sort of memorandum. It did not form any part of the official record. It was made up in pencil and after it served its purpose it was simply left at the office as a memorandum.

Q. It was used to get the money out of the Treasury in the denominations that you wanted the money, was it not? A. That was the purpose for which it was made.

Q. That was the purpose? A. Yes.

Cross Examination.

By Mr. Harley:

Q. You do not know what particular men you paid on this pay roll, do you? A. I paid the men whose names appear on the pay roll here.

Q. All of these (indicating)? A. All of those who were present.

Q. Do you know who were present at the time? A. Each man called in person for his money; it was not for me to give it to anybody else.

Q. I did not understand that you paid all of them. I (821) thought you said the work was divided among three of you? A. I do not say that I paid all of them on those pay rolls. At certain times when it was necessary for me to go and attend to this, I did.

Q. Take the first man on that pay roll, you do not know whether you paid him or not, do you? A. Not on that particular day I do not know whether I paid him or not.

Q. Take the second man, do you know whether you paid him? A. Not on that particular day.

Q. Take the man at the bottom. A. I paid them all at various times but I do not know that I paid them on that particular day.

Q. You know you paid them but you do not know at what particular time you paid them? A. No, sir.

Q. And you do not know what particular man? A. The [illegible] I know I paid him and the second man.

and perhaps if I would look through there I could see others that I may recognize.

Q. But whether you paid the first man on each individual occasion you do not know, of course? A. I do not know that as I have no way of fixing the date. I say I went there a half dozen times or more for this purpose.

Q. And there were three officials, including yourself, who did the paying off? A. At various times.

(822) Q. Three of them? A. I would say there was one other than myself.

Q. You two were the officials who had charge of paying off? A. We were.

Q. You could not tell the gentlemen of the jury, of course, what particular people you paid and what particular people the other man paid? A. I could not fix the date of the paying of any particular person.

(Examination of witness concluded.)

JAMES A. BAILEY (resumed).

Q. (Mr. McLANAHAN) Did you look at those invoices during the time you have been off the stand? A. A very few of them, yes, sir.

Q. Can you say whether or not your name appears on those invoices? A. I can.

Q. It does appear, does it? A. It does.

Mr. HILL: This is the 165, and these are the rest of them. Just glance at them and see if you can recognize them.

Mr. McLANAHAN: These invoices show a certain amount of stone, do they not? A. Yes.

Q. How did you happen to put that amount down on the invoice, where did you get it from? A. Off the schedule in the book.

Q. What schedule? A. The schedule that I had made
(823) up at the quarry.

Q. You speak of the book, is this the book you refer to (indicating)? A. It is.

Q. Are they the books? A. They are.

Mr. HILL: What are those yellow bills in here?

A. I have not seen them.

Q. Just look at them? A. They are the bills with the weight of the car on them.

Mr. McLANAHAN: Where did you get them?

A. I got these from the company; they were sent to the Thompson-Starrett Company, returned to me, and then sent in a note to Mr. Green.

Q. These are the books that you referred to a moment ago when you said that you made the schedule from the books? A. They are.

Q. These books show what? A. The shipments, this, and the schedule further on that is taken off the setting plans.

Q. But this shows the shipments? A. Yes.

Q. Tell us whether or not they are all in your handwriting? A. They are.

Q. And made by you? A. They are.

Q. Will you look at the other books and state whether (824) they are in your handwriting? A. They are all in my handwriting.

Q. And do all that are in these books, these writings, refer to this work of Mr. Graham's? A. Some of it is work in Massachusetts or Milford.

Q. But some part in each one of these books refers to this stone for the Graham contract? A. Very much of it is the Milford work on the basement of the building.

Q. But each one of these books contains some notes on the Graham work? A. They do. I had to do this in order to get it in. I did not have any other books and I had to utilize this space instead of getting more.

Mr. McLanahan: If your Honor please, we offer these books in evidence; we only offer such parts of these books that refer to the Graham contract. I will offer the books and get Mr. Bailey to tell which pages refer to the Graham contract.

(It is hereby agreed that the original books here referred to may be used in any court at the hearing or in argument in this case.)

Q. Will you look at book No. 1 that you have marked on the outside, book No. 1, and state what pages in there refer to the contract for Part C, the Graham contract for the South pavilion? A. Shipping record pages 64 and 65; schedule from page 66 to 129.

Q. That is the shipping record on pages 64 and 65? A. That is the shipping record; the schedule is from page 66 to (825) 129.

Q. Those are the copies of the schedule? A. They are.

Q. And these were taken from them, is that right? A. It is.

Q. Those schedules which were sent down to Washington were taken from that, is that correct? A. It is.

Q. Now, will you look at Book 2 and state what portions of book 2 refer to this stone cutting on part C, the Graham contract? A. 100 and 101—114 to 128 is the schedule.

Q. That is the schedule, is it? A. It is.

Q. And that all pertains to the Graham contract? A. It does.

Q. Will you look at Book 3 and tell us what pages in book 3 refer to the Graham contract? A. Shipment from page 100 to 104.

Q. That is shipment record? A. That is the shipment record. Page 99 is a summary of the whole shipment.

Q. Now, the cubic feet that appear on these three books and that appear on the vouchers, or the invoices, sent down to Mr. Graham's yard are all in quarry cube, are they not? A. They are.

Q. So also in the invoices sent direct to Washington after (826) Mr. Graham quit the work? A. Yes, I think it is all in these three books.

Q. You say you think that all the work on Mr. Graham's contracts which you had to do with at Bethel, Vermont, is upon those three books? A. It is.

Q. That is all the stones that you shipped down are shown in these three books? A. They are.

Q. Are you sure of that? A. The only doubt I have is in reference to the ceiling stone. If you will allow me to look at that I can make sure of it.

Q. The portico ceiling? A. That is the only part that would not be in there and that was because of the lack of space. The ceiling is in there and I believe it is all there.

Q. The ceiling is there? A. Yes, sir.

Q. They are all there?

Mr. McLANAHAN: Have you, Mr. Harley, those way bills that we asked you for?

Mr. HARLEY: Here they are.

Mr. McLANAHAN: Mr. Bailey, will you look at these pieces of paper pasted at the top of the pages in this book and state what they are, if you know?

A. I do not know; I never saw them before.

Q. This up here (indicating)? A. No, sir, I never saw (827) them—

Q. What is that (indicating)? A. That is the Ellis bill to Mr. Graham, I believe.

Q. Did you have anything to do with that? A. Nothing at all.

Q. Do you know what those are? A. No, sir, I do not; I never saw them before.

Q. Can you tell the way bill if you saw it for this freight? A. It is one of those yellow bills (indicating).

Q. These yellow bills show the weights of each of the cars? A. They do.

Q. Can you pick out one of them and show us? A. As I said, these were sent to Mr. Green.

Mr. McLanahan: We would like to get those way bills, Mr. Harley.

Mr. Harley: We have those.

(Way bills produced.)

Mr. McLanahan: Mr. Bailey, will you tell us what these papers are, if you know. Look at them and tell us just what they are; there may be some different ones in there, I do not know. A. I can separate them, can I not?

Q. Yes. A. They are the way bills.

Q. Are they the way bills? A. They are.

Q. Do those way bills show the weights for each car load of stone? A. Each separate car.

Q. They also show the number of pieces? A. These, I (828) had nothing to do with; I had nothing to do with these.

Q. These broad yellow slips— A. It seems to be the same thing but I do not remember that style of way bill. These show the weight of each individual car.

Q. These do (indicating)? A. Yes.

Q. Have you taken from these way bills a statement showing the weights of each car? A. I have taken it in pencil in the book of each car.

Q. When did you take those figures from those way bills? A. As soon as they were returned from Northfield. They were first sent to Northfield, which is 25 miles up the road further, and then sent down in the mail to the quarry. I then took the weight off and entered it in the book in pencil, and I think they were mailed direct from there, in some instances, to Mr. Green. Toward the latter end they were sent down there.

Q. Who did they go to in the beginning? A. After I was stationed at Bethel permanently they were sent down there and I think mailed to Mr. Green.

Q. In the first part of the contract, they were mailed to whom, to Mr. Green or Mr. Graham? A. To Mr. Green from the Northfield office, that is my recollection.

Q. They were not mailed by you? A. No, sir.

Q. Who did the mailing? A. The company.

(829) Q. Whom do you mean by the the company, the Thompson-Starrett Company? A. The Thompson-Starrett Company; they did all the mailing.

Q. Now, you say you have taken off the weights from each of these way bills on your book here. Look at pages 64 and 65 on book 1 and tell us just what you mean by those figures. In the first place, I notice in the first column No. 1, and underneath that two, three, four, five, six? A. They are one, two, three, four, etc., shipments.

Q. Does each shipment mean a separate car load? A. Each a separate car load.

Q. Then I notice the dates that is opposite each one of those shipments? A. That is the date of each shipment.

Q. Of each shipment? A. Yes, sir. That is the date of each shipment when it was sent away from the quarry when they loaded and pulled out.

Q. B. & S. and N. Y. C.? A. That is the car number.

Q After that comes some figures, 10,734, what does that mean, and underneath of that are the figures 841,37? A. Number of the cars.

Q. Then here you have written total cube, and after that, 343.0? A. That is the total number of cubic feet that were on that car.

Q. That was the total number of cubic feet of stone on that

(830) car? A. Yes.

Q. The cubic contents of this car was measured by quarry cube, was it not? A. It was.

Q. From what dimensions do you get the cubic contents, is it taken from the rough block or from the dimensions as shown on the setting plans? A. It is taken from the dimensions as shown on the setting plan.

Q. That was the measurement? A. It wasn't taken over all.

Q. So that the 343 cubic feet might have actually been a good deal more than that, might it not? A. Yes.

Q. And those figures I mentioned were quarry cube? A. They were.

Q. With you tell us what this first column of figures in pencil is? A. That is the number of actual cubic feet per the setting plan.

Q. That is the actual number of cubic feet? A. Actual number of cubic feet per the setting plans leaving off the quarry allowance of one foot, or the fractional parts thereof in the measurements.

Q. Then it isn't at quarry cube, it is the actual measurement, is it not? A. Yes, off the setting plans.

Q. That is shown in the first column of pencil figures?
(831) A. It is.

Q. Does that hold all the way through these shipping schedules in the other book? A. It does.

Q. What is the second line of pencil figures? A. That is the weight of each separate car.

Q. The weight of each separate car, where did you get that from? A. The weight of each separate car as given by the Railroad people at Bethel.

Q. Where did you get that from? A. I got that from the office at Northfield, from the Company.

Q. Did you get that from these way bills here (indicating)? A. I did, through the mail.

Q. You did not have any other way of getting the weight, did you? A. No, sir, only through the mail.

Q. What is the third column? A. The amount of weight per foot.

Q. Of each car load? A. Of each car load.

Q. That was the amount of weight per cubic foot? A. It was.

Q. By that you mean the amount of weight in that rough block of stone, which, after it was cut down later produced one cubic foot of finished stone? A. I do.
(832) Q. That is it A. Yes, sir.

Q. Now, can you tell us just how many cubic feet actual cubic feet of stone—can you tell us just how much an actual cubic foot of stone, cut in the actual dimension, would weigh about? A. After it was cut?

Q. Yes. A. 165 lbs. I reckon.

Q. About 165? A. Yes.

Q. Can you tell us about what the average weight of stone, rough stock, per cubic foot of finished stock, should be, how it should run in the granite quarries?

(Objected to, objection overruled and exceptions noted on behalf of both defendants.)

Q. State what the average weight would be per cubic foot for rough stone, the proper average? A. I should say the average would be from 225 to 250 pounds and that that would be a fair average. Well, some of them would go heavier than that.

Q. And that is what we mean by the average for a net dimension block? A. It is.

Q. Isn't that correct? A. Yes.

Q. Would that vary according to the size of the stone? A. A smaller stone would be a little heavier than the larger
(833) stone.

Q. Why would a smaller stone be a little heavier than a larger stone? A. Because of the excess size required to get out the finished material.

Q. What do you mean by the excess size required to get out the finished material? A. Take a stone 2′ 9″, as some of them in this contract are, 2′ 9″ x 8″ x a 2′ rise. Now, a 2″ allowance on each of those dimensions would make it about a half more which would be, let's see, 165, about—

Q. Just figure out on a stone the size you have given there what it would be. Make those figures right there (indicating)—first of all before you begin those figures, Mr. Bailey, just tell his Honor and the gentlemen of the jury, what, from your experience, you know to be a reasonable extra allowance over the cut dimensions of the block, on any one dimension, on the Bethel stone? A. I should say on a one face stone a 2″ allowance would be fair.

Q. On each dimension? A. On each dimension.

Q. How much of an allowance would you consider to be a reasonable allowance if the stone had more than one face? A. A two face stone ought to have three or four inches in my opinion.

Q. How about a three face stone? A. A three face stone, (831) four probably would not do on that.

Q. That is the allowance made in quarrying stone, so that when a man cuts it down he would have something to go on, is it not? A. That depends largely on the size of the stone. A small stone can be very easily cut on a 2″ allowance but a large stone could not because the cut has much further to go and would probably run out of the way and spoil the material.

Q. Make the calculation on this stone that you have mentioned of 2′ 9″ x 8″ x 2′ rise, with one face with a 2″ allowance on each dimension? A. Do you want me to make the allowance measurement also?

Q. Yes, I want to show just how many cubic feet the actual dimension of that stone would be, and make the calculation on the 2″ allowance, and show how many cubic feet would be in that stone. A. Here it is (handing paper to counsel).

Q. Tell the gentlemen of the jury what your calculation is first of all as to how many cubic feet would be in this stone 2′ 9″ x 8″ x 2′? A. 3′ 8″.

Q. 3 cubic feet 8″? A. 3 cubic feet and 8/12.

Q. Now, then, will you tell us, making a 2″ allowance on each one of the dimensions that I have before stated, how many cubic feet would be in the stone calculated on that 2″ allowance? A. 5′ 3/12.

Q. 5 cubic feet and 3/12? A. Yes.

Q. And you make that by putting 2″ on each one of those (835) dimensions? A. Yes.

Q. And that makes 5′ and 3/12 as against 3′ 8/12 on the original stone? A. It does.

Q. Making a difference of how much percentage there? A. 1′ 7″. It would be very nearly 50%.

Q. It would be more than 50%, wouldn't it? It would be nearly 100%? A. 1′ 7″ is about half of 3′ 8″—it would be 1′ 7″ over.

Q. That is about 50% over? A. Yes.

Q. That would be the net dimensions for a stone that size with a 2″ allowance? A. It would.

Q. And that would give you the net dimension block? A. It would, and that would be a fair allowance.

Q. And you say that the average would be from 225 lbs. per finished cubic foot to 250 pounds? A. I did. That is an ordinary size, gentlemen.

Q. What do you mean by stone cut on one face? A. As ashlar, for instance, only showing on the building one size.

Q. But that stone has to be really cut on more than one side, does it? A. Of course it has to be shaped into the place in which it goes.

Q. You mean that it is finished up smooth on one face, do (836) you not? A. Yes, surface measurement.

Q. But it has to be cut evenly all around? A. What we call surface measurement.

Q. Now, will you take the same size stone and suppose you have to finish it say on four faces, like a column base or something of that kind? A. You mean one of those big stones there (indicating) down under the column?

Q. What is that? A. You mean the base under the column?

Q. Take a base under the column for example, yes. A. Let me have the book. I can see the exact size right there. I can see the exact size without any calculation.

The Court: Is there a setting plan that shows that?

The Witness: Yes, but it doesn't show the calculation.

Q. (Mr. McLanahan) All right, Mr. Bailey, take this same size stone, for instance. Do not take a column base but take an imaginary stone of the same dimensions, 2′ 9″ x 8″ x 2′, and tell us what the net dimension block would contain if you were going to finish two surfaces? A. On a stone of a 2′ rise I should say about 3 or 4″ would be a fair allowance for each dimension.

Q. Calculate that out and show how many cubic feet we would have for a 3" allowance, 3" one way? A. That is only the way the work goes. It isn't always like that. That would give you a stone of 5' 5".

Q. That would give you a stone of 5'? A. Yes, that is (837) only increasing one dimension.

Q. Increasing it 1", that would be 5' 5"? A. It would.

Q. Suppose you take a stone the size of a column base, for example—can you point out just the dimensions of that square column base or the round column base? A. These bases are separated from the general schedule sum and I am a little rusty on them and of course it will take some time.

Q. Just take any large stone that appears in the schedule? A. Now, these bases cube up 98' 10".

Q. Cube up 98' 10"? A. Yes.

Q. What would you say would be a fair allowance for those bases that were finished on four sides? A. The quarry allowed 6" on each dimension and I thought it would be a very fair allowance. They allowed a 6" increase on each dimension.

Q. What was the length of these bases, for instance? A. 6' $\frac{1}{2}$", 6' $\frac{1}{2}$" x 2' 8 and 5/16.

Q. That is the rise? A. Yes.

Q. And they allowed 6" on each dimension of those stones? A. They did. I can qualify that, if you please.

Q. Certainly. A. The 6" was in cutting it out of the quarry and after it was lifted up and trimmed up I got the quarrymen to reduce it on the bottom bed, plug out, some (838) considerable overplus on the stone if there was much of it so as to reduce the weight.

Q. They allowed a 6" overall on the length and depth of these large stones? A. That is where we could safely do that.

Q. By looking at your book can you tell whether or not you have made any calculations, and whether or not you can tell us what the average weight per cubic foot was on the first ten shipments? A. 278 pounds.

Q. 278? A. Per foot.

Q. Is that heavy or light? A. I call that heavy, a little heavy for those individual stones.

Q. When were they quarried, at what time of the year were they quarried? A. They were all quarried along in the winter time mostly.

Q. It is as easy to quarry stone in cold weather as it is to quarry it in the summer time? A. It is not.

Q. Why? A. Because the stones do not break so easily on account of the frost. The frost in the stone prevents it from going smoothly, as it would go in the summer, warm weather.

Q. Why is that? A. Because the stone is harder on account of the frost. That is the only reason that I can give you or that I know of.

Q. Take the next ten shipments and tell us, if you can, the (839) average weight per cubic foot of those shipments? A. The next ten?

Q. Yes. A. The next ten was 269 average.

Q. What would you say about the heaviness or lightness of those shipments? A. It was getting a little better there.

Q. How was that? A. The weather was breaking up some and it was getting better at that time.

Q. Tell us about the next ten shipments. Up to the first thirty shipments, from the second ten to the third ten, what was the average weight? A. 249½.

Q. When was that? A. That was in the summer time along July and June and May.

Q. Now, then, you have figured out here the next seven shipments. Tell us what the average weight per cubic foot it on those? A. 238½.

Q. 238½? A. Yes.

Q. That is the average on the last seven, is it not? That isn't the average on the whole page? A. That is the average on the last seven shipments on that page.

Q. Each that you have given us is for ten shipments down to the 30th, and then after that for seven, is that correct? (840) A. That is correct.

Q. What is the average on the first 37 shipments? A. 260½.

Q. Now, tell us what is the average on the next 37 shipments? A. 221 and 54/100.

Q. What is the average on that? A. 221 and 54/100.

Q. The dates for this second 37 run down through July 30th, 1907, down through October 16th, 1907? A. Yes.

Q. And you make the average on those 37 shipments as being 221 and 54/100? A. Yes.

Q. Will you turn to the next book. This begins at No. 75 shipment and goes down through the 112th shipment. Will you tell us what the average was from the 75th shipment down to the 112th shipment inclusive? A. 211 and 60/100.

Q. That is the average number of pounds per cubic foot, is it not? A. It is.

Q. Will you tell us what the average was from the 113th shipment down to the 150th shipment? A. 211 and 68/100.

Q. 211 and 68/100? A. Yes, sir.

Q. All of those shipments were made to Mr. Graham, (841) were they not, so far? A. Yes; yes, sir.

Q. Can you tell us what the average is from the 151st shipment down to the 165th shipment? A. 235 pounds.

Q. 235 pounds? A. Yes, sir.

Q. Now, all of those were shipped to Mr. Graham in Baltimore, were they not? A. They were.

Q. Now, from there on, to the 166th load, have you the whole average up to this point of the loads shipped to Mr. Graham? A. No, sir, I have not. I have an average of the whole contract.

Q. You have an average of the whole contract but you have not the average of this. A. No, sir.

Q. Now, the rest of the cars shown here then were shipped to the Museum contract, shipped to Washington? A. Yes.

Q. Have you the average calculated separately from the 165th load to the 188th load? A. I have not.

Q. You will have to give that for the whole page, from the 151st load to the 188th load? A. I will.

Q. What is it? A. 227¾.

(842) Q. Now, will you give us the total average from the 189th load to the 226th? A. 217 and 32/100.

Q. Pounds? A. Yes, sir.

Q. And will you give us the average from the 227th load through the 264th load? A. 222 and 55/100.

Q. Now, the 264th load was the last load shipped to anybody from the quarry on this South Pavilion contract—I believe were eleven more loads—have you some more there, Mr. Bailey? A. Here they are (indicating).

Q. Here is the 265th load and it runs down to the 275th load. Now, the 275th load was the last load? A. Yes.

Q. Will you tell us what the average was from the 265th load through the 275th load, what is the average? A. 237 and 18/100.

Q. Now, can you tell us what the total average was on all the car loads shipped both to Mr. Graham and down here to Washington? A. 226 and $\frac{38}{3}$ pounds.

Q. 226⅜ pounds were the average of all the stones shipped (843) on that contract? A. Yes, sir.

Q. Will you tell us when the first setting plan arrived at the quarry? A. Along about Christmas of 1906.

Q. And was work begun on the stone called for in that setting plan by the quarry at that time? A. Was the work done?

Q. Was the work begun on that stone then? A. The schedules were immediately gotten out and sent to the quarry.

Q. What are those schedules that you refer to? A. They are the schedules of the different sizes of the stone and

they were sent to the quarry, the plans being held by the Company.

Q. And the schedules were made out from the plans, were they not? A. Yes.

Q. How are they made up? A. They made up a separate plan, you might say, off of the setting plans.

Q. That separate plan was taken off of the setting plan? A. Yes.

Q. And they were sent over to the quarry? A. They were.

Q. Did you see this first setting plan that came up there about Christmas? A. I did.

Q. Did you see the other setting plans that were sent up (844) there? A. Afterwards, yes, sir.

Q. Did you ever see any other setting plans in this form during the course of your experience as a stone cutter? A. They are the only ones I ever saw like that.

Q. Do you know whether or not it is practical to quarry stone for any kind of a contract of this size without having setting plans?

Q. Can you say that it is the proper thing to do? A. I do not think that it would be safe.

Q. Did you ever know it to be done? A. I never have, only in a very small way.

Q. I ask you in a contract of this size and character have you ever known it to be used? A. I never have.

Q. I should have said have you ever known the setting plans not to be used? A. I never have.

Q. You say the setting plan arrived up there about December, 1906, about Christmas, 1906? A. Yes.

Q. When was the first car load shipped out from the quarry, if you can tell us? A. January 17th, 1907.

Q. January 17th, 1907? A. Yes.

Q. What kind of weather were they having up there from Christmas, 1906, to January, 1907? A. We generally had (845) it zero and below. Just before that I remember writing Mr. Green that we had it 23 degrees below zero.

Q. Was it pleasant, sunshiny, or wet, or how was it? A. The sunshine was all right.

Q. Did you have any snow during that time? A. Lots of it.

Q. How many feet of snow were there, if you can recall? A. I do not think that I could measure the snow in feet at that time of the year. It was probably 10 or 12" or 8" or something like that.

Q. Do you know whether there was snow in the quarry during this time? A. There probably was. There was at

Northfield but I had not been up there at the quarry for a month or so.

Q. Did you inspect this shipment of January 17th? A. I am speaking of before Christmas.

Q. I mean between Christmas and January 17th, how was the weather then? A. Just about the same.

Q. How about the snow? A. There was lots of snow in the quarry. I was down there twice before that shipment was made—once, before that shipment was made, rather.

Q. Your book shows that the total quarry cube measurement in the first shipment was 343 cubic feet? A. It does.

Mr. Harley: I think he has made a mistake of 10′ somewhere in there. I have 343.2.

Mr. Hill: That is only 10 feet and it doesn't make any (846) difference to us.

Mr. McLanahan: Our invoice shows 343 feet, which is exactly what is in the book.

Q. There were 343 cubic feet in that first shipment, were there not? A. Yes.

Mr. Harley: That is quarry cube.

Mr. McLanahan: Yes.

Mr. Harley: I beg your pardon.

Mr. McLanahan: Can you say whether or not from your experience as a stone man, granite cutter and quarry man, that the amount of stone in that first shipment was a reasonable amount to have gotten out at that time of the year and under the weather conditions as they were then existing at Bethel.

A. I should say considering the weather and the conditions up there it was very good, while I found fault with it at the quarry.

Q. You say that you found fault with it at the quarry? A. I did, but with the conditions as they were and the condition of the quarry at that time, you might call it fair.

Q. Were any more shipments made that month? A. No, sir.

Q. Were any more made in February? A. No, sir.

Q. There weren't any made in February? A. No, sir.

Q. Now, can you tell us when there were any more shipments made, but first of all, tell us why there were no more

shipments made in January and February? A. For the rea-
(847) son that there weren't cars sent there to take the stone away.

Q. During that time was the stone being quarried? A. The stone was being quarried but we were waiting for cars.

Q. The quarry was going right along during that time? A. The quarry was working every day.

Q. Was there any shipments made in March that you recall? A. I do not recall any to my knowledge.

Q. Your book does not show any in March? A. It does not.

Q. Can you tell us around March 20th, if you can recall, how many loads of stone were there waiting for cars to come for them at the quarry cut for this South Pavilion work? A. I believe about that time I stated there were eight car loads waiting for Mr. Graham's contract.

Q. You stated that in what? A. In a letter to Mr. Green.

Q. Did the quarrying operations continue after the time that I have mentioned? A. Right along.

Q. I notice the next shipment was on April 22nd, 1907? A. Yes.

Q. Was that one car load? A. That is one car load.

Q. Just one car load? A. Yes.

Q. So that they didn't get all the eight out on that, and
(848) they had what they had cut in the meantime? A. They did not; they did not get it on that car load.

Q. The third shipment was on May 6th, 1907, and that was one car, was it not? A. Yes.

Q. One car in the third shipment there? A. Yes.

Q. So that even up to that point they had not gotten out of the quarry all the eight car loads you mention that they had on hand back there in March? A. No, sir.

Q. Was the quarrying going on right straight along from that time on regularly? A. It was.

Q. And after that I notice during the month of May there were eight car loads going out and during the month of June there were ten, and then during July here I make it about twenty cars in July, and then in August regularly right after that?

Mr. HARLEY: How many?

Mr. MCLANAHAN: 19 I make it that were shipped from there in July.

Q. Now, when the first shipment was made in January, 1907, was all the cut stone that was there put on that first shipment, if you can recall? A. It was not.

Q. There was some there that did not go on the first car load right then? A. There was some there that did not go on (849) the first car load at that time.

Q. And that condition continued for how long? A. That condition continued all through the contract; there was always stone there waiting for the cars.

(The jury having retired.)

Mr. HARLEY: With your Honor's permission we have already, I think, called upon Mr. Pirie to produce certain memoranda which he said he had to supplement the entries in his book. Now, I understand my brother Hill has the same ready.

(Mr. Pirie here produces papers in his possession and delivered them over to Mr. Harley.)

Mr. HARLEY: I appeal to the court for the privilege of cross examining Mr. Pirie tomorrow on the papers that he has produced. He says that he has the paper which I want in Washington and I would like to have him produce that.

Mr. HILL: We have produced what Mr. Harley asked us for.

Mr. HARLEY: We called upon Mr. Pirie, if your Honor please, when he was on the stand under cross examination, in the presence of the jury, before this court to produce these papers and this is what he has produced. I would like to cross examine him on it tomorrow and let him explain it.

The COURT: It is in evidence now.

Mr. HARLEY: Will you allow the jury to see it and let Mr. Pirie explain it tomorrow?

The COURT: If he is here. Mr. Hill says it needs no further explanation.

(Thereupon the court adjourned to meet again tomorrow morning.)

Mr. MCLANAHAN: If your Honor please, with the consent of the other side, we would like to withdraw Mr. Bailey for a few moments and put on a gentleman from Washington (850) who is an employe in a bank over there, and who would like to get back.

The COURT: You may do so.

WILLIAM C. LOOKER, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (MR. MCLANAHAN) Where are you employed just now? A. I am at the District National Bank, Washington.

Q. Where were you employed during the spring of 1908, or all of 1908 from March on and during the spring of 1909? A. I was employed in the office of the Superintendent of Construction at the building of the new National Museum in Washington. The office was at the building.

Q. What were your duties at the office? A. In a clerical capacity.

Q. In that capacity did you have anything to do with keeping time on any of the men working there? A. I did.

Q. What men's time did you keep a record of? A. I kept the time of the men employed by the Government and also the men employed on the Graham contract.

Q. You kept the time of the men on the Government work there and also of the men finishing up this Graham wok? Did you keep them together or separately? How did you keep them separate? A. We had separate gate rolls for the men (851) employed on the Graham contract.

Q. Do you know who put the men's names on the gate roll, if you recall? A. I think in most cases those names were entered up by Mr. Hagan. I entered some, I know.

Q. Entered them on the gate roll? A. Yes, sir.

Q. How was the time kept, will you tell us how you kept the time? A. The men employed on the Graham contract were given brass checks and were told to deposit those checks with the watchman in the morning when they came to work. At eight o'clock they were supposed to be all there and the box containing the checks was brought to the office. Those checks were turned on the desk, on the check board and placed on the numbers corresponding. Then the gate roll was taken and the names or numbers were checked off on the gate roll corresponding to the checks received that morning, a single line corresponding to each name and number under that date.

Q. Did you keep the Graham checks on a separate board? A. Yes, sir; on a different part of the board, starting with a different serial number.

Q. How did you check those names off on the gate roll? A. I had the gate roll at my desk and the master mechanic called them from the check desk and I checked them off as he called them.

Q. Are these the gate rolls which you referred to (in (852) dicating)? A. They are.

Q. Are these the time checks on the Graham workmen (indicating)? A. They are.

Q. You say these checks were put on the board, and who were the checks called off by? A. By the master mechanic.

Q. That was who? A. Mr. Freas.

Q. What did you do? A. I checked opposite the number of the gate roll in the column of that date when the number was called.

Q. Are these your checks here (indicating); are they the marks which you made? A. Yes, sir; those are the check marks I made.

Q. After you checked them over did you do anything further to see whether or not they tallied, whether the tally was correct? A. We always did that.

Q. You checked them back again? A. Yes, sir; either then or sometime later before the noon hour.

Q. What was done then about the time after that, after you had gotten it on the gate roll here from those brass checks? A. That was kept in the office and not touched unless a man quit work for a fraction of the day and the time was changed then from a single stroke to a half or a quarter stroke, whatever it was, and other than that it was kept until about an
(853) hour or half an hour before quitting time which was 4:30, when it was checked up with the field book of the special timekeeper on the Graham work.

Q. What was his name? A. Hagan.

Q. You mean it was checked back to see if those two tallied up? A. Yes, sir; that was the idea.

Q. And if they did not tally up what was done then? A. We had to find out what the correction was and if necessary hunt up the foreman or see the man himself.

Q. Then what was done with respect to this roll and the field book? A. If the field book was found to be correct—that is, if the gate roll and field book tallied then the special timekeeper entered the fact contained in this gate roll on to his permanent time book.

Q. If the field book and the gate roll did not tally, then what did you do? A. We had to make the correction and find out what the trouble was.

Q. I understand when you got through that the two would always tally? A. The two would have to tally.

Q. What was done after those two were gotten together or tallied? A. The time book then was turned over to the master mechanic and he again made an additional check to satisfy himself that the book was correct for that day and for-
(854) warded it that evening to the office of the Superintendent at the Library of Congress.

Q. That is the small Library time book? A. Yes, sir.

Q. And that is made up from what? A. From the gate roll and checked back with the field book.

Q. And when would that time be entered in the small library time book? A. That would be entered somewhere between three and four-thirty in the afternoon.

Q. After the field book had been checked up or before? A. After the field book had been checked up.

Q. And the small library time book was sent to the office of Mr. Green at the Library? A. It was.

Q. Did you personally see these men at work whose names are on that gate roll? A. I did, from time to time. It was not my business to see them but I happened to see them in passing.

Q. Did you have anything to do with the pay rolls at all, did you see them? A. Yes, at the first part of the work when not so many men were employed the money was paid out of our own office, that is the office of the building was there for the Government particularly, and I saw time and time again money paid to the Graham workmen out of the window right over my desk. At least, I saw the envelopes handed over to them.

(855) Q. Who handed them over? A. Mr. Sheehy.

Q. And how long did that continue there at the building? A. I do not recollect.

Q. It was only the first part of the work? A. Only the first part.

Q. Did you have anything to do with the material received for the Graham contract? A. I did.

Q. Will you state what it was you had to do with it? A. Material coming to the building for the Graham contract was checked up by me, I may say, in most cases. It was checked up by me—that is the drayman's slip was checked with the material delivered and in most cases the drayman's slip was signed by me.

Q. And in all those cases where you signed the drayman's slip did you look at the material yourself and see that it corresponded with what the drayman's slip called for? A. In most cases.

Q. Did you keep any record of that in your office at all, that is, the material you looked over? A. I did.

Q. What did you keep it in? A. I kept a copy of what is known as the daily report of the receipt of materials.

Q. Are these what you refer to as the daily reports of the

(856) receipt of material (indicating)? A. They are.

Q. Which part of those reports refers to the Graham materials and which to the materials for the other part of the building? A. These small slips (indicating) would refer to

the Graham contract. In most cases it is stated that they are received on account of contract 25, which we understood as the Graham contract.

Q. In whose handwriting are those small reports there? A. Mr. Freas'.

Q. You say you kept a book on which you kept the big report there, or only the small ones? A. Both.

Q. Will you look at the book I now hand you and tell us what it is? A. That is a copy made of the daily report of the receipt of materials on account of the Graham contract.

Q. Are there any other entries made in that book except material on the Graham contract? A. I should say not; I am almost certain not. I do not see why there should be any other.

Q. Those are your entries on that book, are they? A. In most cases.

Q. Who's else are there? A. I see some writing here of Mr. Hagan's.

Q. How much of Mr. Hagan's writing? A. There appears to be about a week there (indicating) one day further on, another day, that is about a week after that one; one more day; one more day about two weeks after that; one more day; and on the last page I see some writing of Mr. Freas'. It simply (857) refers to the disposition of materials. What he has written here is "Credit contract No. 25 and charge to U. S." on three dates.

Q. What appears there as being credited to that account? A. I presume what the material was of that day.

Q. You do not know what it is? A. It appears to be lumber for those three days.

Q. And that lumber is credited to the Graham account taken over by the United States, is that it? A. That is my understanding of it.

Q. Can you take that book and look through there and tell us some of the items which you personally remember receiving, that is of your own personal knowledge? A. (reading from book) On April 25, 1908, a large consignment of various articles, tar paper, roofing nails, tin caps, heavy strap hinges, hinge hafts, locks and knobs, hooks and eyes, wire nails, round bastard files, from James B. Lambie Company—I remember receiving those. Also on the 29th, tool steel, black diamond, in several sizes and weights and soft steel and Norway iron—

Q. Just tell us the amount of each as you go along? A. On April 29, from Washington Gas Company, 120 bus. large coke. On April 30, 1908, from James B. Lambie Company 8 Peter Wright Anvils, 1,135 lbs. On May 1, 1908:

8 Wrt. bar swivel vices,
6 sheets 30″ x 96″ gal. sheet iron,
6 sheets 24″ x 96″ gal. sheet iron,
12 No. 2 Barrett Jacks,
(858) 42 16″ flat bastard files,
2 10″ flat wood rasps,
2 14″ flat wood rasps,
61 ft. ½″ quar. oct. tool steel 24½ lbs.
11½ ft. 1¾″ x 1¾ oct. tool steel, 120 lbs.

May 2, 1908, from James B. Lambie Company, 50 rolls 2 ply tarred paper. May 5, 1908, from James B. Lambie Company, 12 12 lb. steel sledges, 9 steel squares 30″ x 96″; from George F. Muth Company, 50 thumb tacks.

On May 8, 1908, from James B. Lambie Company:

19 6 ft. green wood rollers,
1 50 amp. 250 V switch,
6 50 amp. link fuses,
120 ft. No. 6 rubber covered wire.

On May 9, 1908, from James B. Lambie Company:

8 40″ Pittsburg bellows,
18 4 ft. green wood rollers,
1 Dodge wood pulley, 40″ x 6″ x 1-15/16″,
2 Dodge wood pulleys, 14″ x 5″ x 1-15/16″,
4 Standard B & S Pillars 1-15/16,
1 Ducks nest Tuyeke iron.

On May 11, 1907, from James B. Lambie Company, 5 6 ft. Greenwood rollers, and 6 4 ft. Greenwood rollers.

On May 12, 1908, from C. H. Bearers, 4 water barrels sand from F. W. Bolgiano, 600 lbs. rock salt. On May 13, 1908, from C. H. Bearers, 12 water barrels. On May 14, 1908, from James B. Lambie Company, 4 duck nest Tuyere irons and from Johnson Brothers, 2,240 lbs. George's Creek
(859) Bit. Coal.

On May 15, 1908, from Trow and Holden:

1,000 plugs (iron),
2,000 feathers (iron),
300 ¾″ stone drills,
26 6 lbs. stone axes,
24 6 lbs. hull sets,
540 ⅞″ stone points 10″ long,
367 ⅞″ stone points 8″ long,
200 ¾″ stone chippers, 8″.

Q. (Mr. McLanahan) Have you made any marks on that book showing as you went over it the other day what you remembered and what you did not? A. I have.

Q. Will you show us that mark? A. I just made a check mark (indicating on book).

Q. Will you show us a check mark on that page? A. These are the marks.

Q. These check marks down here are yours, are they? A. They are.

Mr. McLanahan: These check marks show the ones which he personally recalls. We offer this book in evidence. The items which he personally remembers about have a small check mark opposite them.

(It is hereby agreed that the original book here referred to may be used in any court at the hearing or in argument in this case.)

Mr. Harley: Does that go in subject to exception?

Mr. McLanahan: Oh, yes.

(860) Q. What do you call that book, Mr. Looker? A. That is the copy of the daily report of the receipt of material received on account of the Graham contract.

Q. And the handwriting in there is your handwriting with the few exceptions which you mentioned a while ago? A. Yes.

James A. Bailey, a witness heretofore produced and sworn on behalf of the Government, resumed the stand for a continuation of direct examination and testified as follows:

Direct Examination (con'd.)

Q. (Mr. McLanahan) Mr. Bailey, you told us yesterday that there was some snow in the quarry there between Christmas, 1906, and January 17, 1907. What was the condition of the quarry during the remainder of that January, and during February, as to snow? A. My recollection is that there was a great deal of snow in the quarry, and ice, of course, accumulated.

Q. How does that quarry lie, on a level? A. No, sir; it lays on a slope.

Q. Was there as much snow and ice on the top part of the quarry as on the bottom? A. No, sir; that naturally went into the bottom of the quarry.

Q. And how was the bottom of the quarry with regard to the ice at that time, during January and February, 1907? A. You might say that it was filled up all the time, the lower (861) part of the quarry.

Q. When did that condition cease to exist, if you know, that is in the lower part of the quarry? A. That would not come out until the latter part of April or the early part of May.

Q. Not until then? A. Well, much of it disappeared, but it would not really come out until early in May.

Q. When does the frost come out of the ground up in that country? A. The latter part of April or the first of May. Say about the middle of May.

Q. Will you look at this drawing No. 2 here, that is the blue print of it, and tell us what stones are called for on that drawing? A. Square stones under the column, molded base under that and then the column.

Q. Does the molded base go on top of the square base? A. Yes, sir.

Q. And then the column drum? A. Yes, sir; the column drums come on top of that.

Q. How many column drums were there? A. Six if I remember rightly.

Q. How many columns? A. Eight columns.

Q. Were those large or small stones? A. They are very large.

Q. What part of the quarry were those stones taken from? (862) A. They would have to be gotten out of the bottom of the quarry where the larger stones were.

Q. What part of the quarry did practically all of the larger stones come from? A. It practically all came out of the lower part of the quarry.

Q. Will you show us on these pictures which is the top and which is the bottom of the quarry? A. It shows best on these two (indicating). What I would call the top is up here (indicating) and this is the bottom. Here is the railroad track and the deep hole is right here. This is the upper end of the quarry showing the end of the hole. All the stone lays in there.

Q. In the testimony there has been mention made of some bad stone having been taken from the top of the quarry; where is that? A. That would be way back in here.

Q. And you say the larger stones— A. The larger stone comes out of here (indicating). There are some of the larger stones here.

Q. Where was the ice in the quarry? A. Right around here (indicating).

Q. Was there any ice around these tracks? A. Yes, sir.

Q. Could they work the bottom part of that quarry in January or February or March effectively? A. Not very economically.

Q. Did they do any work in there, as a matter of fact, at (863) that time? A. I think they did work out some snow and ice in order to get at those large stones.

Q. Why is it that you cannot get the larger stones at the top of the quarry? A. On account of the shelly condition; most New England quarries have a shelly top which thickens as you go down.

Q. How is a block of stone gotten out of there? Explain that; is it sawed out or how is it gotten out? A. It is cut out with tools. These holes here (indicating) show the channel has been cut in here.

Q. What is that? A. That (indicating) is the channel; it is set this way and the drill works along that bar. They come down in here and put a Lewis hole here (indicating) and then they push it out that way.

Q. Is a stone cut out all the way? A. Until they find the bed.

Q. It is cut by a series of holes like this (indicating)? A. Yes, sir; and then it is slipped.

Q. How far down are these holes driven? A. To the next bed. It might be four or six or nine feet—wherever they find it.

Q. I notice that this stone here is very rough (indicating on photograph); is that a stone cut that way? A. I could not say. You see these small wedge holes on this one—

Q. How far down do those small wedge holes go, to the (864) bottom of the stone? A. No, sir; three or four inches.

Q. Then what is put in there? A. The feathers and then you put the wedge in there and drive that.

Q. So is a splitting or an actual cutting? A. It is a splitting.

Q. It is practically the same thing as taking an ax and splitting a piece of wood? A. Yes, sir; the same thing.

Q. When you drive that wedge in there and split that can you tell us whether there is a grain in the stone like in wood or would it go straight? A. The stone at the top is called the rift (indicating); there is a head grain (indicating) and the side grain; it cuts easier on the head grain than on the side grain.

Q. What do you mean by the grain? A. The edges of the stone. The rift is the flat way (indicating on photograph).

Q. When you start splitting a stone with a wedge, does that split run straight up and down? A. Not always; sometimes it will run one way or another; in this quarry the rift

being that way (indicating) the tendency is to run that way (indicating).

Q. In other words say this is the uphill side of the quarry and you start driving a wedge in here (indicating), how would the rib run? A. The tendency is to run under here.

(865) Q. And the longer the stone it down this way (indicating) the farther the stone would run under? A. Yes, sir.

Q. And over here the same thing would happen, would it not (indicating)? A. Yes, sir.

Q. It would run off that way (indicating)? A. Yes, sir.

Q. How about the side grain—you say that is harder to cut by than the head grain? A. That is harder; yes, sir.

Q. Say that this is the uphill side of the quarry and you started to cut this block out or split it out; how would it run along here (indicating)? A. The tendency is to run straight on this side.

Q. But on the other side? A. It might rag out.

Q. It is like cutting a piece of wood across the grain, it would be more ragged? A. Yes, sir.

Q. Mr. Bailey, have you figured up the average on the first 165 car loads, the average pound per cubic foot? A. I have.

Q. That is on the 165 sent to Mr. Graham? A. Yes, sir

Q. Will you tell us what you make that average to be? A. 228 pounds and 63/100, I believe I made it.

Q. How did you arrive at that average, did you take each (866) number or just take the number on each page? A. 228.63. I took that by adding up the four pages and part of this fifth page and dividing by 5.

Q. That is the way you arrived at it? A. Yes, sir.

Q. And these measurements that you made, all these averages in that book up on, are the actual measurements of the dimensions of the stone and not the quarry cube measurement? A. That is the actual plan size.

Q. You testified yesterday that the average pounds per cubic foot on all the stone sent down by Mr. Graham and also the Government, 275 car loads, was 226 pounds and a fraction? A. Yes, sir; I did.

Q. Do you, from your experience, consider that as a fair average per cubic foot for granite stone? A. I would consider it extra good average for that quarry.

Q. Why do you consider it extra good for Bethel? A. Because the patterns come out so much rougher than at other quarries.

Q. How does Bethel compare with the Mount Airy quarry? A. Very badly as to pattern.

Q. In the Mount Airy quarry you can cut them straighter? A. Yes, sir.

Q. Does that splitting of the rift have anything to do with that? A. Yes, sir; that has something to do with it.

Q. Do you know what a net dimension block is as known (867) in the stone business? A. I believe I do.

Q. What is a net dimension block? A. Any figure that might be mentioned might be net—but in this case a fair allowance on the dimensions of the plan would give you a net dimension block.

Q. Was such blocks as that furnished to Mr. Graham? A. Generally, yes.

Q. What do you mean by that? A. There is always some extra rough patterns, I have never been anywhere where there were not any rough patterns.

Q. Were there more in this one than in other contracts? A. Yes, sir; on account of the condition of the quarry and the nature of the stone.

Q. And yet you said a moment ago that you considered this as being a good average for the Bethel quarry? A. Yes, sir; I did, as to the weight.

Mr. McLanahan: I want to show page 64 and page 65 of this book No. 1 to the jury.

(The book referred to was then shown to the jury.)

Mr. McLanahan: That will be all, if your Honor please.

Cross Examination.

Q. (Mr. Harley) Mr. Bailey, where were you in October, 1906, that was the month that you went down to Bethel? A. Yes, sir; the first trip I made to the quarry after leav- (868) ing Northfield.

Q. What were you doing there? A. Inspecting the work for the main building outside of this contract.

Q. Who had that contract? A. The Thompson-Starrett Company.

Q. That is the same company that was operating the granite quarries? A. Yes, sir.

Q. The Thompson-Starrett Company, then, was furnishing granite for the Company on the other part of this building? A. Yes, sir.

Q. Large blocks in large quantities? A. These blocks were not as large as those there (indicating).

Q. But it was a large contract. Now, where was the Thompson-Starrett Company doing the cutting, please, Mr. Bailey? A. At Northfield.

Q. Then the Thompson-Starrett Company operated this quarry at or near Bethel? A. Yes, sir.

Q. And sent its own stone down to Northfield to be cut there? A. That is right.

Q. And they sent the Graham stuff to Graham's in Baltimore to be cut there? A. Yes, sir.

Q. Now, this is the settlement or village of Bethel, is it (869) not (indicating on map)? A. That is the way I understand it.

Q. This whole thing is known as the township of Bethel? A. That is what I understood.

Q. And the quarries are up here (indicating)? A. Yes, sir.

Q. Is that right, sir? A. That is right.

Q. And they were operated during all this time by the Thompson-Starrett Company? A. That is who the contract was with, but the E. B. Ellis Company owned the quarry.

Q. The Thompson-Starrett Company was the lessees? A. They had the contract to furnish the material.

Q. During 1907, the entire output of this quarry belonged to the Thompson-Starrett Company? A. Yes.

Q. Now, the entire output of the quarry, then, went to the Government either through Graham and the Thompson-Starrett Company or directly through the Thompson-Starrett Company? A. The whole of their output went to those two contracts—no, the depot in Washington was being worked at the same time.

Q. In 1907? A. Yes, part of 1907; they had not completed that contract yet.

Q. Then the Thompson-Starrett Company had a contract with the depot? A. Yes, sir.

(870) Q. The Pennsylvania Railroad, think you, sir? A. Yes, sir.

Q. And that was an earlier contract than either of these two contracts? A. Yes, sir.

Q. And they did finish that up early in 1907? A. Yes, sir.—I won't say early, I think it was along about the middle before they had entirely completed it. They did another job for Albany in the meantime.

Q. How big a job was this depot job? A. Well, I do not know the number of feet. I had nothing to do with it.

A. Approximately? A. I would not like to say anything about it.

Q. Compared with this Graham job it was a very large job, was it not? A. Yes, sir.

Q. How about the Albany job? A. That was a small affair.

Q. Was that the capitol? A. No, a bank building, I think.

Q. During this time, then, the Thompson-Starrett Company had control of the output of these quarries? A. Yes, sir.

Q. How did the Thompson-Starrett Company get the output to the Central Vermont Railroad which runs through the village? A. There was a railroad put up there before I went up (871) there; there was a track right here (indicating), which ran down and connected here.

Q. That little spur from the village of Bethel to the granite quarries carried only the granite, did it not? A. Yes, sir.

Q. And it was owned and controlled by the granite people? A. I do not know who owned or controlled it.

Q. You don't know who owned it? A. No, sir.

Q. But the only work done on that little spur was taking away the output of the granite quarries? A. And bringing up the supplies to the quarries.

Q. Before that time do you know how it was shipped? A. On wagons it was brought down to the main track.

Q. To the main track here at the village? A. Yes, sir; I don't know it of my own knowledge——

Mr. Hill: Then we ask that it be stricken out.

The Court: Strike it out.

Q. (Mr. Harley) Would the cars run up here to the quarry then in 1907? A. Yes, sir; they would.

Q. The cars would be taken up on this little spur road to get the granite? A. Yes, sir.

Q. And you don't know what connection the quarry people had with this little spur road?

The Witness: What financial connection?

Mr. Harley: No, didn't they control it?

(872) A. I don't know that.

Q. Didn't they operate it? A. I don't know who operated it or controlled it.

Q. I do not mean financially. A. I saw the stone coming down and the cars going up.

Q. Whose engine was used? A. The Central Vermont's.

Q. And who had control of it you don't know? A. I understood the Central Vermont controlled the situation; that is all hearsay, though.

Q. Now, Mr. Bailey, you went there first in October to look over the field? A. That was as inspector of the work before the Graham contract was let.

Q. Then the Thompson-Starrett Company contract directly with the Government was let before the Graham contract? A. Oh, long before.

Q. And you were working on that Thompson-Starrett Company contract? A. Yes, sir.

Q. How big a contract was that, do you know, about how many cubic feet? A. It is all hearsay; I never figured it out.

Q. Do you know about how many cubic feet were in this Thompson-Starrett job which you just referred to, not the exact number of feet, but just about?

The WITNESS: The depot contract?

Mr. HARLEY: No, the Government contract which was be-(873) ing cut at Northfield? A. I never figured it out.

Mr. HARLEY: I did not expect you to figure it out, but don't you know just about? A. I don't know for a fact.

Q. Don't you know that it was a very large contract—very much larger job than the Graham job? A. I don't know that. I never figured it out whereas I did figure out the Graham contract.

Q. But with that job the stone was put on board the quarry and carried down to Bethel and then down to Northfield? A. Yes, sir.

Q. And that is where you were engaged mainly in the early part of 1907? A. Yes, sir.

Q. When was the Thompson-Starrett direct job with the Government finished, or about what time? A. July, 1908; is that the Graham contract?

Mr. HARLEY: Oh, no.

Mr. HARLEY: I refer to the job which you stated was cut at Northfield, Vermont, if you please, sir. A. About the first of October, 1907.

Q. About the first of October, 1907? A. The first or second, I think that was the date.

Q. Then, during—or say from January until October, they were shipping from the quarries most of the stone of the Graham contract and the stone on the other contract which was cut at Northfield, is that correct? A. Yes, sir.

(874) Q. Now, when the Thompson-Starrett Company shipped from the granite quarry in the arrangement of the cars, to which contract, if either, did they give the preference? Their own contract or the Graham contract? A. There was no question of cars in that case, only this far, that the cars that carried the stone from the quarry to Bethel were direct cars and did not leave there; those cars only went from the quarry to Northfield.

Q. (Mr. McLANAHAN) Went to where? A. Went to Northfield.

Q. (Mr. HARLEY) You had plenty of cars to take the stone from the quarry to the Northfield job, is that correct, sir?

The COURT: Ask him did you have plenty of cars for this service?

A. (Mr. HARLEY) Well, didn't you have plenty of cars to take the stone from the quarry to the Northfield job of the Thompson-Starrett Company? A. We did.

Q. After the completion of the Thompson-Starrett job at Northfield, Vermont, on or about the first day of October, 1907, didn't you have plenty of *jobs* to take the stone of the Graham job to Baltimore? A. We did not.

Q. You did not have plenty? A. No, sir.

Q. As a matter of fact wasn't the Thompson-Starrett Company, which company operated the quarries up to the first part (875) of October, 1907, all the time giving preference to their own job at Northfield over the Graham job, Mr. Bailey, if you please? A. Well, I should say not. I will tell you the reason why; they could not get cars furnished to take away the stone for the Graham contract. Had they gotten cars they could have taken away more stone.

Q. As a matter of fact, didn't you see that this company gave a preference to its own job rather than to the Graham job? A. I did not.

Q. You did not notice anything of that kind? A. I did not see that.

Q. After October first, 1907, where was his company shipping, to what point was it shipping any granite in October, 1907, besides to the Graham job? A. I cannot recall to any point.

Q. Any in November? A. I cannot recall.

Q. Any in December? A. I cannot.

Q. Any in January, 1908? A. I cannot.

Q. In other words, after the first day of October, 1907, or about that time, the entire output of the quarry went to the Graham job? A. Yes, with this exception: I think there was one of the figures being done now about that time, or along about that time for the station in Washington. I will not be certain of that.

Q. About how many cubic feet were in the figure, do you (876) know? A. No, I never figured it up. It is 16 feet high, a very large piece of stone.

Q. Just one piece of stone? A. Yes, sir, which was very large.

Q. And with the exception of that stone the entire output of the quarry at or near Bethel, from October, 1907, for the first four or five months, went to the Graham job? A. That is right.

Q. Now, Mr. Bailey, you went there in October. In October I understand your headquarters were at Northfield? A. Previous to that time they were in Northfield.

Q. Previous to October, 1906? A. No, 1907.

Q. Oh, I beg your pardon. Previous to October, 1907, your headquarters were in Northfield, Vermont? A. Yes, sir.

Q. And you did not move to the Bethel quarries on this job until about that time, until about October, 1907? A. That is right.

Q. (The Court) Were the same cars carrying stone to Northfield, Vermont, used for carrying stone to Baltimore and Washington? A. No, sir; they were not: I cannot recall the dates, but I know there was a great shortage of cars all through 1907, and the cars that had previously taken the stone from Bethel to Northfield had been utilized out on the road and they furnished new cars in place of those old cars to take the stone from Bethel to Northfield.

(877) Q. (Mr. Harley) The Central Vermont substituted other cars for those old cars? A. Yes, sir; still making the same condition as to car service.

Q. Mr. Bailey, be good enough to look at this first shipment of yours while you are at it. That is your signature, is it not? A. Yes, sir.

Q. That was what car, if you please?

The Witness: What car?

Mr. Harley: It is B. & S. No. 10,734?

A. Yes, sir.

Q. Now, what is that first stone on there? A. A-4.

Q. How many stones are there, can you tell, Mr. Bailey, please, sir? Q. You have not got the number of stones on there.

Q. Can you count them? We want to check them with our invoice which we received from the quarry? A. 26.

Q. (Mr. Harley) I ask you to take the invoice which I now hand you and compare it with your first invoice and say whether that refers to the same car?

The Court: Ask the witness what it is.

Mr. Harley: Tell us what that is.

The Witness: I believe that is the invoice sent directly from the quarry to Mr. Graham.

Q. (Mr. McLanahan) Why do you believe that? A. (878) Because when I went down there to the quarry in October—of course this was in January some time previous, but it seemed to be of the same make-up and character of the invoices sent after I was there at the quarry.

Q. Did you ever see that invoice made up yourself? A. No, sir; I only say it is of the same character as the other invoices.

The Court: You want to ask him if it compares correctly?

Mr. Harley: Yes, sir.

The Court: Is there any difference?

Mr. Harley: Only of about 10 feet.

The Court: What is the purpose of it?

Mr. Harley: We want to offer it in evidence.

The Court: I do not exactly see how you can put it in that way, unless you propose to show some inconsistency in this testimony.

Mr. Harley: If your Honor please, this is the invoice which we got from the quarry and it agrees substantially with the first invoice which was signed by Mr. Bailey.

The Court: But that throws no additional light on anything.

Mr. HARLEY: Just now the first one does not, but as we go along I think some of the others will, if your Honor please.

Mr. HILL: Mr. Harley is offering this in evidence and testifying himself what it is. The witness says that he knows nothing about it.

The COURT: I do not think that you can put it in evidence that way. You can use the paper to cross examine the witness and show any discrepancy, and you can offer it afterwards, if you choose. You can prove it by someone else.

Mr. HARLEY: By whom, sir?

The COURT: By some men who can identify it.

Mr. HARLEY: The man who received it?

The COURT: I am not supposed to know or to tell you by whom.

(879) Mr. HARLEY: Well, this is the man who ought to know.

Mr. MCLANAHAN: We object to that. He has nothing to do with it.

Q. (Mr. HARLEY) Who is this man Haley? A. He is a quarry foreman.

Q. And who is Wheeler? A. Wheeler is a timekeeper who checked the book.

Q. I ask you now to compare this with your own invoice No. 1 and state whether or not that is correct?

Mr. HILL: I object to that. My brother can take this paper of his and ask the witness questions, which will show that he has testified incorrectly, but he cannot ask him to compare this paper which is not in evidence with a paper which is in evidence.

The COURT: He can ask him that question.

Mr. HILL: We note an exception.

Mr. MCLANAHAN: Mr. Harley, what do you mean as to which is correct?

Mr. HARLEY: I will make it plainer. I will ask you which of these papers is correct?

Mr. McLANAHAN: He cannot say which is correct. He can say whether they agree or not.

The COURT: Put it in the other form, whether it substantially agrees.

Mr. HARLEY: Do you understand the question now, Mr. Bailey.

The COURT: I do not see why you cannot say they agree.

Mr. HARLEY: But I want to offer them all in evidence.

Mr. McLANAHAN: We have no objection if the proper witness comes on the stand and says what they are. Mr. Bailey had nothing to do with them and therefore unless he can get somebody to come here and say that they are proper and are in the right shape, we object.

Mr. GAITHER: He testified that he knew about these papers from the time when he went there in October.

(880) The COURT: No, he said they agreed with his.

Mr. McLANAHAN: He has not said they agreed with his papers but he said that he saw papers like them when he went there in October and he therefore thought they were the same kind of papers.

The WITNESS: There is a difference——

The COURT: Go ahead.

Mr. McLANAHAN: We note an exception.

The WITNESS: A 13 on my invoice is 18 feet 9, and on this other invoice it is 18 feet 7.

A. (Mr. HARLEY) Which is that? A. That is A 13; on your paper it is 18 feet 7, and on my paper it is 18 feet 9; that also applies to A 4.

Q. And what have you? A. I have 18.9 and you have 18.7.

Q. Look at Mr. Pirie's. A. I don't know anything about that.

Mr. HARLEY: Well, it is in evidence.

The WITNESS: It is 18 feet 7, but that is his paper and I don't know anything about it.

(881) Q. (Mr. HARLEY) How did you get this? A. From the setting plans; the draftsman and I took this up.

Q. You took it right from the setting plan, those that were delivered at Northfield? A. Yes, sir.

Q. Do you find any other changes there? Do you find any other *disparagies*?

The WITNESS: B 21 on your paper is 13 feet 9 cube, and on my invoice 13.8. 8.C 35 on your paper is 20 feet 4, and on this invoice—my invoice—it is 20 feet. C 34 on this paper is 15.9, and on my invoice it is 15.6; B 10 on your paper is 14 feet and on my invoice it is 14.4. B 35 on your invoice is 7 feet 1, and on my invoice it is 10 feet 11. B 32 on your paper is 8 feet 3 and on my invoice it is 12 feet 7. F 15 on your paper is 10 feet 1 and on my invoice it is 9 feet 10. A 43 on your paper is 18.7 and on the invoice it is 18.5; A 4 is the same. B 3 on your paper is 9 feet 3 and on my invoice it is 8 feet 9. B 40 is the same. B 36 on your paper is 13 feet 7 and on my invoice it is 13.1. B 6 on your paper is 3 feet 7 and on my invoice it is 5 feet 6. B 8 on your paper is 7 feet 1 and on the invoice it is 10 feet 11. C 3 on your paper is 15 feet 9 and on my invoice 15.6. B 41 is 17.5 on this paper, and on the invoice 16.11. B 2 is the same. A 10 on your paper is 13 feet 7 and on the invoice 13.1. C 2 on this paper is 20 feet 4 and on the invoice it is 20 feet. B 15 on this paper is 11 feet 11 and on the invoice is 11 feet 8. A 7 compares.

Q. (The COURT) Have you totalled it in any way? A. The total on this paper is 533 feet 2—that is taking their fig-
(882) ures for it—

Mr. MCLANAHAN (Interrupting): That is the ground of our objection. There is nothing to prove what this is on here or to show what these measurements were made at. It has been testified there were two kinds of measurements, and as we do not know anything about that paper we object to the paper and to any comparisons between them.

Q. (Mr. HARLEY) Does the system of measurement affect the dimension at all? A. No, sir.

Mr. MCLANAHAN: But it affects the cubic feet which you were giving just now.

Q. (Mr. HARLEY) Yours is at quarry cube? A. Yes, sir.

Q. And the dimensions were from the setting plans? A. Yes, sir.

Q. And at the time you signed them you were at Northfield, Vermont? A. Yes, sir.

The COURT: Mr. Harley, I cannot let that examination go on. In the first place, the time you will take is a great objection, and it does not prove anything that I can see that is material to the case. This was a contract for a lump sum and not any number of cubic feet. I cannot see the pertinency at all.

Q. (Mr. HARLEY) Where were you when you signed this second one?

The COURT: Mr. Harley, I cannot permit you to ask that. What is the purpose of it?

Mr. HARLEY: The witness has testified as to a state of affairs at Bethel, Vermont, and he has testified that he was at Northfield, Vermont, up until October, 1907,—but

The COURT: But it does does not take all that grilling to do that. I cannot allow that to go on because it consumes time and you have shown me no purpose which it is going to subserve.

Q. (Mr. HARLEY) Look at the second one: where were (883) you at that time? A. This is Mr. Johnson's other inspector.

Q. And you have no knowledge of that at all? A. No, sir.

Q. Did you get these dimensions from the setting plan? A. He got them from my books.

Q. And you made your book from the setting plan? A. Yes, sir.

Q. Or, as nearly as you could at the time? A. Yes, sir.

Q. You endeavored to make it up from them? A. Yes, sir.

Q. Mr. Bailey, you referred to the difficulty of quarrying in the winter time. I ask you whether, as a matter of fact, the Thompson-Starrett Company did do any quarrying on the Graham contract in the winter of 1907? A. They did.

Q. How much? A. Well, considerable of those setting plans Nos. 1, 2 and 3.

Q. Are you sure they did not send Mr. Graham—I believe you were not there very much? A. No, only on visits to inspect the stone. When there were cars furnished to load on I went up to inspect the stone.

Q. When did you commence that? A. I went down on the 15th and 16th of January, if I remember rightly, and the first shipment was on the 17th, and then there were no more (884) cars furnished until in February. The cars were there all that time—

Q. In the meantime you were sending stone to Northfield? A. Oh, yes.

Q. I want to invite your attention to what Mr. Pirie says and see if you can explain that. Here is a copy of the letter of July 31, 1907. It reads as follows: (Reading)

"Dear Sirs:—In returning invoices of the 25, 26 carload rough granite received on the 27th inst. also the 24th shipment on the 30th I have to note quite an improvement. The faces on nearly all are smooth and what is known as gain faces the drilling on nearly all of the stones had been done on a 2" to 3" allowance, a lot of stones that had been quarried for what was marked on them, and not tail ends from something else, such as we have mostly received. When the first two cars were unloaded I consulted Mr. Graham, telling him that I thought for encouragement to those that had been trying to bring about this shape and size of patterns. I would write you and class the two cars as a fair lot. He did not quite agree with me in that and showed me some ashlar that was over thickness and he thought might be broken down with the bull set which of course could be done at little cost to the quarry, but unless they care to do that I doubt if that can be required, at the same time I picked out a few ashlars that were less than the depth, and Mr. Graham was satisfied with them. He has not seen the 24 car load, after receiving that and consulting his foreman in his absence I took it on myself to call it fair. On the 26th inst. before receiving these three cars young Ketridge, who represents the Thompson-Starrett Company, called (885) to see about rough patterns and other things we could not hold them here on exhibition but did the best we could to show him what we had drilled from what was supposed to be net dimensions blocks, also the splits made here compared with the same thing done at the quarry. We showed him the spotted ashlars on the Banlers, also showed him on the plans where they were supposed to go and where I was trying to put the worst of them and asked him to so report to his company in order that we may get a better grade of ashlar and stone that Mr. Graham can cut without putting unnecessary work on it.

Was glad to see by note on invoice that stone 4-31 not on 14th shipment had been located."

Now, as a matter of fact, during all that winter and the early part of the year did not the Thompson-Starrett Company

do its own quarrying for its own job and did not it give Graham only the tail ends of its own jobs? A. I should not think so.

Q. Are you sure that is not a fact? A. I am sure of this: If cars had been furnished more stone would have been shipped to Graham during that cold season.

Q. Didn't they give Graham the tail ends of the work? A. No, sir; I think not.

Q. You were not paying any special attention to the quarrying? A. They were quarrying all the time I was there.

Q. But you did not pay any special attention to that? A. Only to the stone delivered; only to the stone delivered on board cars.

(886) Q. Only to the stone delivered on board cars? A. Yes, sir.

Q. You have your book there. Will you tell us when the first stone was delivered free on board the cars, that is right there at the quarry?

Mr. HILL: I object to that question free on board the cars as a legal item?

Q. Well, then, when did the Thompson-Starrett Company put its first shipment on board a car? A. I referred to the Graham—

Mr. HARLEY: You can look at your book.

The WITNESS: Well, the invoice will do. I approved this invoice and I state now that it was correct.

A. And that shows that the first shipment was placed on the cars by the Thompson-Starrett Company when? A. On the 16th and it went out on the 17th.

Q. Of January, 1907? A. I will explain that different. When I went to Northfield I sometimes went on the train that hauled the stone down, and they could not load anything and bring it away during that day, and therefore they had to wait until the next day. That car was loaded on the 16th and shipped on the 17th. I was then back in Northfield.

Q. How about the second one? A. I was not there at all. I was home on a vacation at that time.

Q. And Mr. Johnson was there then? A. Yes, sir.

Q. Is that the only one you missed? A. That is about the (887) only, I think, that I missed.

Q. The third load was placed on board the cars by the Thompson-Starrett Company when? A. Shipped May 6.

Q. When was the next load placed on board the cars by the Thompson-Starrett Company? A. May 19.

Q. May, 1907? Now, can you state whether the dates of your invoices, all the balance of the 165 invoices is the date upon which the Thompson-Starrett Company placed the respective loads on the cars? A. I believe I can.

Q. You can state that to be correct. So, the date of your invoices already offered in evidence shows the date on which it was placed on the cars at the quarry, the fifth shipment being May 10, 1907? A. I have it here in detail, if it is just the same to you, and while I have not compared the invoice with this list here, I was very careful in making them up and signing them.

Q. And those dates given in your book are the dates the Thompson-Starrett Company placed the cargo on the cars? A. Dates of the invoices which would amount to the same thing.

Q. And your book here shows the 165 shipments? A. You can see that 75th shipment there and here is the 76th—Q. Those shipments are intended to agree with these invoices already in evidence? A. Yes, sir.

Q. And each of them shows the date of the delivery of (888) the stone on board the cars at the quarry? A. Yes, sir.

Q. Now, Mr. Bailey, look at your book and tell me how you figured out that average of the 165 loads, if you please, sir. I think you gave it as 228.63 lbs. to the cubic foot. A. That is the average for the whole of this.

Q. The average weight per cubic foot for the first 37 loads is 260½? A. Yes, sir.

Q. Now, show me how you figured out the general average? A. Take this one page, you mean?

Mr. HARLEY: No, you testified that for 165 loads the average was 228 pounds and a fraction? A. I take this average first found on each load; and this average on the next 37—That is 221.54 per cubic foot on the second 37? A. Yes; on the next 37—no, 38, 214.60 pounds; on the next 38 loads, 214.68.

Q. Average weight per cube? A. Yes, on the next 15 loads average, 231.87.

Q. Then, you took those 5 averages and added them up and divided them by five? A. Yes, divided by five.

Q. Don't you see that is not fair or correct, because in figuring in the first average you have 37 shipments; you have 37 shipments in figuring the second average, in the third average you have 38 shipments; the fourth you have 38 shipments

and in the fifth average you have how many, sir? A. 15, I (889) think, sir.

Q. And you have treated all five alike so that you can see the fallacy, can you not? A. No, sir.

Q. Have you taken the weight for 165 loads and divided it by 165 and gotten an average in that way? A. I have not.

Q. Then, don't you see that that will give you an entirely different average from the one that you have there? A. I cannot see it.

Mr. McLANAHAN: Suppose you try it yourself.

Mr. HARLEY: I am mathematician enough to know that that average is unfair. I do not mean to say that Mr. Bailey means to be unfair.

Q. If you take 15 with a low average and average it with 37 at a high average and count them the same, don't you see the injustice of your calculation? A. I cannot see it.

Mr. McLANAHAN: Why, that last average of 15 loads was the highest of all.

Q. Now, the most of this work performed by Mr. Graham was one face work, was it not? A. Ashlar or one face stone.

Q. Now, in doing that kind of work, the thickness—is that what you call it? A. Yes, the thickness into the wall.

Q. Is not very important is it? A. No, sir.

Q. So there is no difficulty at a quarry in getting that (890) somewheres about right? A. Yes, sir; that is right.

Q. So there are only two dimensions to be considered?

The WITNESS: What are you going to do with the third one? You must have a third dimension.

Mr. HARLEY: I thought you said it did not make much difference because it went into the wall?

The WITNESS: But you must have a third one to work on.

Q. If the quarry has no trouble getting them close enough, why the necessity of one or two inches allowance? A. Well, you must give some figure to work on and those 8 and 12 inch figures are what the quarrymen have to work on. Now, if a stone was offered at 8 inches it would be accepted, and if it was offered at 7 inches it would be accepted on that measurement.

Q. Well, let us say that this (indicating) is the cube. That (indicating) you call the thickness into the wall? A. No, this is the thickness (indicating).

Q. Well, then, let us set it up right. There is the thickness into the wall? A. Yes, sir.

Q. Now, say that is 12 inches. A. Yes, sir.

Q. Then, if quarrymen happen to cut it all inches it will do, won't it? A. It will.

Q. And if the quarrymen happen to cut it at 13 inches it (891) will do? A. It will.

Q. Then, why the necessity of adding 2 inches to that, cannot the quarrymen get that near enough without any trouble? A. But, he according to usage, is allowed that 2 inches.

Q. He does not really need that 2 inches, he doesn't really need to put that 2 inches more freight on Mr. Graham, but as a matter of fact he does it? A. Yes, it is a matter of usage.

Q. (Mr. Harley) You say according to the usage of quarries that an allowance of 2 inches would bring what is known as a net dimension block? A. I should not call that arbitrary.

Q. Well, about 2 inches? A. Well, about 2, 3 or 4 inches.

Q. You said yesterday that 6 inches on a side would be all right, making a foot altogether? A. Oh, no, 6 inches over the dimension.

Q. Then you did not mean 6 inch on this side and 6 inches on the other (indicating)? A. No, sir.

Q. I want to ask you, then, whether that usage applies to all three dimensions? Doesn't it apply merely to the height and width? A. It applies to all dimensions. The quarryman is not supposed to know what that stone is for; he simply gets a schedule and he does not know how it is to be worked.

Q. When he has the setting plans which show all about the (892) stone? A. The quarry don't have them.

Q. I thought they were absolutely necessary. A. That was for the company to make out their schedule.

Q. Weren't the setting plans used in cutting the stone? A. At the quarries at Northfield so that the quarry schedule could be made up.

Q. A man who had the setting plans knew how it was to be cut, which was the height and which the depth and which the length? A. He did.

Q. Now, it has been testified—or you figured out for the District Attorney two stones, one face finish; now, I want you to figure out one with an average around 14 cubic feet, four feet 6 inches long, please, sir.

The Court: Is that according to the setting plan?

Mr. Harley: This is taken right from the setting plan.

Mr. Hill: Which stone is that, please?

Mr. HARLEY: It is page 52 of Mr. Piric's book. Now, what is the number of that stone?

Mr. GAITHER: This is course S, No. 30; take stone on course S, No. 30, page 52, and state what that is. A. 4.6 length.

Q. What is this? A. 1.3 depth into the wall.

Q. What is the height? A. 2 feet 5¾.

Q. Now, cube that for us, please. A. 13.11, dropping a small fraction.

(893) Q. Now, add 2 inches to each dimension. A. 17 feet 4.

Q. Now, will you add 2 inches to the length and height and keep the same depth? Now, that will make how much?

Mr. MCLANAHAN: We object to that.

The COURT: Haven't you some standard book there?

Mr. MCLANAHAN: We were to supply the net dimension blocks and that left 2 inches over all on each dimension. Now, to figure out the stone leaving one dimension out is not proper.

The COURT: I think he can answer the question.

Mr. MCLANAHAN: We note an exception.

(Mr. GAITHER) Now, that will make how much? A. 12 feet 4, that is the total.

Q. Give us the 1 foot 3, I want you to cube it. A. Then it is 15 feet 5 less a small fraction.

Q. What is the cube of that stone as given originally by Mr. Pirie? A. 14 feet 1.

Q. What is the difference between that and the last figures you have then? A. 1 foot 4.

Q. What percentage is that? A. You are getting too deep for me now.

Q. You cannot give the percentage of what 1 foot 4 inches of 14 feet is?

The COURT: I think that is unfair to the witness.

Mr. GAITHER: If he says he can't do it, then it is all right.

A. I can do it, but it will take time.

Q. It will take time to find out what percentage 1 foot 4 is of 14 feet? A. Yes, sir; and I am not sure that I could do it correctly.

(894) Q. State whether the dimensions of that stone are not all over one foot in every direction? A. Yes, sir.

Q. Look now at a stone in the portico; look at page 174 on No. 8 in the portico ceiling. Please read those dimensions. A. 9 feet $2\frac{1}{2}$.

Q. What is that? A. That is the length; 1 foot 6 is the depth or bed, as we call it.

Q. In the wall? A. In the wall, and 1 foot $11\frac{1}{2}$ is the height; the cube is 27 feet.

Q. Mr. Bailey, will you kindly add 2 inches to all three of those dimensions of that stone?

The COURT: What are you going to ask him? To give the cubical contents of it?

Mr. GAITHER: Yes, sir; he did that on direct examination with two or three stones.

The WITNESS: May I have the blue print to see that stone?

Mr. GAITHER: Just add 2 inches to each dimension of that stone?

The WITNESS: Probably that would not be enough, Mr. Gaither.

Mr. GAITHER: I am not asking you that. I just want you to add 2 inches to make that calculation.

The COURT: I do not think he can be required to do that. You can make it and state it to him or you can read it from the standard table. I do not think you can put him through an arithmetic test. It takes quite a good deal of time. Mathematics done under pressure this way are not always correct.

Mr. HILL: I object to any question which is merely arithmetical. The implication afterward would be that those 2 inches—

(895) Mr. GAITHER: I am simply asking him to add 2 inches to each dimension of that stone.

The COURT: I sustain the objection.

Mr. GAITHER: Exceptions noted.

The COURT: You can point out any stone on the setting plans and ask him with regard to it.

I simply want him to make that calculation with the two inches added.

The COURT: That may not be enough on that stone. The stone might require some particular cutting.

Mr. GAITHER: I am asking him to cube this stone simply to find out how much more he makes it with the two inches on each side.

The COURT: On the four faces?

Mr. GAITHER: On the three faces.

Mr. MCLANAHAN: That is what we object to. The witness said that some of these larger stones that 6 inches should sometimes be allowed.

The COURT: I sustain the objection.

Mr. GAITHER: Exceptions noted.

Q. (Mr. GAITHER) I want to ask you the same question adding two inches to the length and heighth and ask you what the calculation would be?

(Objected to; objection sustained; exceptions noted.)

Q. I want to ask you the same question adding 3 inches to the length and heighth of that stone?

(Objected to; objection sustained; exceptions noted.)

Q. (Mr. HARLEY) You did not profess to be very correct at figures? A. That is correct, that is true.

Q. As a matter of fact you are not correct at figures?

(Objected to; objection sustained.)

By Mr. MCLANAHAN:

(896) Q. Mr. Bailey, in answer to one of Mr. Harley's questions about cars at the quarry to haul stone from the quarry down to Northfield to the Thompson-Starrett Company's cutting plant at Northfield, I will ask you how far it is from the quarry to Northfield about? A. I stated 25 miles the other

day from Bethel to Northfield. Now, whether it is 25 or 28, I won't say for sure but I am inclined to think it is 28, and it is about four miles from Bethel village up to the quarry.

Q. From the station? A. Yes.

(897) Q. From the Post Office there to the quarry? A. Yes.

Q. Will you tell us about how many cars were used between the quarry and the Northfield cutting plant on this work by the Thompson-Starrett Company? A. I would say there were ten or twelve of those cars used on that work.

Q. How were those cars used? Did they get new cars up there every time they wanted stone carried down from the quarry to the cutting plant at Northfield or did they use the same cars? A. They used the same cars.

Q. Back and forth. A. Back and forth.

Q. In other words, it was this train that went back and forth between the quarry and the cutting plant at Northfield? A. It was.

Q. Did those cars ever go anywhere else except back and forth between the quarry and the cutting plant at Northfield? A. They did. They took these cars away, some of them, and put them on the main road.

Q. That was when? A. That was along in the summer of 1908.

Q. In 1908 they took off some of this train, and did they put other cars in the place of the ones they took off? A. They did. They put new cars in the place of the old ones.

Q. So all this train did was to run back and forth from the quarry to the cutting plant of the Thompson-Starrett Company? A. That is all.

(898) Q. In answer to a question of Mr. Harley's, you said that the figure stated in your books, or the shipping schedules that you were testifying to, the list of shipments there, corresponded to the figures shown on the invoices. Does that refer to the cubic dimensions? A. That refers to all dimensions, cubic and all.

Q. I understood you to say in direct examination that the invoices were all on the basis of quarry cubic measurement, and that the cubic feet, as shown in these books in the shipping schedule were all on the actual dimensions, is that correct? A. No, the cubing here is on the quarry cubic.

Q. I thought you told me it was on the actual dimension on direct? A. That was as to getting at the weight of the stone on the car.

Q. That was only as to the getting at the weight of the stone on the car? A. It was.

Q. That is getting at the actual dimension of the stone? A. Yes, in arriving at that weight I cubed it at the actual size.

Q. And these pencil figures are based on that actual measurement? A. They are.

(899) THOMAS H. GODFREY, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. McLANAHAN:

Q. Where are you employed, sir? A. Why, I was employed from November, 1907, until March, 1909, at the new Museum building as watchman.

Q. From November, 1907, until March, 1909, you were employed at the new Museum building as watchman? A. I was.

Q. And during that time, at what time did your watch begin? A. It began at seven o'clock A. M. and ended at three P. M.

Q. There has been evidence here that there were certain checks deposited in reference to the keeping of the time. Did you have anything to do with those checks? A. It was part of my duty to receive time checks from all workmen employed by the Government on the building direct.

Q. It was your duty to receive checks from men employed on the Graham part of the work and men employed on the other part of the work? A. It was.

Q. What did you do? A. They were handed me in the morning and I deposited them in a box until eight o'clock when they went to work, and then they were sent to the office and my responsibility ended.

Q. How were the checks brought in, just in what way? A. They were handed to me personally; I received them personally.

(900) Q. Now, did any one man come in with a bunch of checks, or with one check in his hand? A. No, sir, each man had his own individual check and I accepted no other check.

Q. You accepted no other check? A. No, sir, each man handed his own check in, and he had one check only.

Q. You were very careful to see that he only had one check, were you not? A. I was, very careful indeed. It was one of the most exacting duties of my position to see that a man had only one check.

Q. How were those checks sent to the office? A. The checks were sent to the office by a messenger.

Q. What office were they sent to? A. To Mr. Freas' office.

Q. What kind of box was it? A. It was an oblong box, I suppose of about 10" with a slot in it to deposit the checks in.

Q. You took all checks from men working on both the Graham work and any other work? A. I did.

Q. Are those some of the checks (exhibiting brass checks that have already been offered in evidence)? A. They appear to be. They are the same checks as I can tell them by the oblong opening and the general appearance of them.

(901) Q. Where are you employed now? A. I am working at my trade now as bricklayer. I worked on the building previous to my taking sick, and I was given that position temporarily as watchman.

Mr. HARLEY: What was that? Where is he employed?

Mr. MCLANAHAN: He is working at his trade as a bricklayer.

Q. You are not working for the Government now? A. Not for the Government.

Q. What was done about men who did not get to work by eight o'clock in the morning? A. Well, they were sent up to the office.

Q. Were they allowed to go to work right away if they came late? A. That was left to the discretion of Mr. Freas; I did not know anything about that.

Q. You knew nothing of it? A. I had nothing to do with that. When they came a little late, of course if they came quite late, they would have to go to the office. I was directed if they were only a minute or two late there was no use sending them to the office and they could go to work. If they were quite late they were sent to the office and Mr. Freas used his own discretion in that matter.

Q. The checks for the men on the Graham work, and the men on the rest of the work, all went in the same box, did they not? A. They did.

CROSS EXAMINATION.

By Mr. HARLEY:

Q. Who was the messenger who was sent up with this (902) box of checks? A. It was a colored man employed there at the office; I do not know his name; I do not recall his name.

AMOS S. SAUDER, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. McLANAHAN:

Q. You were employed about the Museum building, were you not? A. I was.

Q. Just on what dates? A. I was there two years and six months.

Q. When did you go there? A. The 1st of May, 1907.

Q. You went there the 1st of May, 1907, and were there for two years? A. Yes, sir.

Q. Mr. Godfrey has testified that he was the watchman there up until March, 1909? A. Yes, sir.

Q. And that he had charge of the morning watch there from seven o'clock in the morning until three o'clock P. M.? A. Yes.

Q. Did you ever have charge of that morning watch? A. I did.

(903) Q. Just when? A. When Mr. Godfrey left I taken charge of the morning watch but before that I went on at three o'clock in the evening and did not come off until eleven at night. After Mr. Godfrey left I took the watch from seven o'clock A. M. to three o'clock P. M.

Q. That was from March, 1909? A. Until the work was finished.

Q. What were your duties in connection with these checks, or with the time checks of the men on the work? A. Well, we taken them checks as the men come in from the *men* and put them in a box, and at eight o'clock we would send them up, or take them up, to the office. At eight o'clock we closed the gate and sent the checks up.

Q. To what office do you mean? A. Mr. Freas' office.

Q. At the building? A. Yes, at the other end of the building.

Q. Do they look like the checks that were used by the men (indicating)? A. They do.

Q. While you were watchman there, you would take the checks from the men, would you not? A. I would.

Q. Would you let a man give you more than one check? A. No, sir, we got orders to that effect.

Q. Orders to the effect — A. —that each man bring his own check in.

(904) Q. You heard Mr. Godfrey's testimony about the box, did you not, just now? A. Yes, it was about ten x 4 x 6 or something like that.

Q. With a slot in it? A. Yes.

Q. Could anybody open it or was it locked up? A. No, sir, it wasn't locked.

Q. You say that before Mr. Godfrey went off the morning watch you had the afternoon watch from three o'clock on? A. Yes.

Q. Did you have charge of the men getting their checks at night when they went away? A. No, sir, only for a while part of them hung by the gate and of course I could see them get them sometimes but not all the time.

Miss A. Hattie Schauster, a witness of full age, having been duly sworn, testified as follows:

Direct Examination.

By Mr. McLanahan:

Q. Miss Schauster, will you tell the gentlemen of the jury and his Honor where you are employed at the present time? A. In the Library of Congress, in the Superintendent's office.

Q. Just a little bit louder so that all of the men on the jury can hear you? A. In the Superintendent's office, Library of Congress.

(905) Q. And that Superintendent is whom, what is his name? A. Mr. Bernard R. Green.

Q. Bernard R. Green? A. Yes.

Q. And how long have you been employed in that office, Mr. Green's office? A. Eight years.

Q. Eight? A. Eight years.

Q. Do you recall the time that they were finishing up the work on contract No. 25, or rather that they were at work on contract No. 25 down at the National Museum building? A. I do.

Q. Did you have anything to do with any of the time books or pay rolls on that work? A. Yes, I made up all the pay rolls.

Q. You made up all the pay rolls? A. I did.

Q. Are they the pay rolls that you made up? Look through them and see if they are the ones (handing papers to the witness)? A. They are the ones.

Q. They are the ones, are they? A. They are.

Q. What did you make up these pay rolls from? A. From the large time book in the Library.

(906) Q. From the large time book? A. Yes.

Q. Will you look and see whether they are the large time books that you refer to. They are already in evidence? A. They are.

Q. Are they the books, look at the other one and make sure? A. Yes, these are the ones.

Q. They are the large time books? A. Yes.

Q. And you made up these pay rolls from those time books, did you? A. I did.

Q. After those pay rolls were made up from the large time books, what was done then? A. We compared them with the small time books from the Museum.

Q. They were compared with the small time books? A. Yes, sir.

Q. Are those the small time books that you refer to (handing books to the witness), these books are already in evidence? A. Yes, they are the ones.

Q. Those are the small time books? A. Yes.

Q. And what was the purpose of this comparison? A. Why, to see that the totals were correct.

Q. I beg pardon? A. To see that the total tallied with the small time books. It was to see that the rolls tallied with the small time books.

Q. After you made the pay roll up from the large time
(907) book you saw whether the pay roll tallied with the small time book, is that right? A. It is.

Q. Did they tally? A. Always.

Q. After you had gotten the pay roll made up and compared, what was the next step that was taken toward paying the men off? A. Well, then, we wrote the envelopes, put the names on the envelopes preparatory to filling them with money.

Q. And did you put the amount on the outside of the envelopes? A. The amount, name and number.

Q. Where did you get the names and numbers from? A. Originally, from the small time book and then from the roll.

Q. What do you mean by that? A. I mean that the envelopes were written from the rolls.

Q. Afterwards? A. Yes.

Q. The names and amounts and numbers were put on each of the envelopes? A. Yes.

Q. Was there any check made of the envelopes with either the roll or the time books? A. They were checked with the small time book and the roll. The envelopes were compared with those two.

Q. Compared twice? A. Yes, sir.

Q. Did they tally up every time? A. Yes, always.

(908) Q. Then, when was the money actually put in the envelopes? A. Well, after we saw that they were correct, that the rolls were correct, we put the money in the envelopes.

Q. Just a little bit louder. A. After we saw that the rolls were correct we put the money in the envelopes.

Q. You saw the money being put in the envelopes, did you? A. Well, I always helped. Mr. Shechy saw it.

Q. He was in charge of that? A. Yes.

Q. And you assisted in putting the money in the envelopes? A. Yes.

Q. Was there any tab kept on the amount of money that was put in the envelopes at all? A. Why, yes, the check was made up for the total amount of the roll.

Q. And then the money was put in the envelopes after that? A. Yes.

Q. The amounts on the envelopes were added up, were they not? A. Yes.

Q. And that would have to correspond with the check in order to be correct? A. Yes.

Q. Was it correct in every instance? A. It was.

Q. As you put the money in the envelopes, was it counted out as it was put in? A. Yes, it was counted out and handed to a second person who usually counted it before it was put in (909) the envelopes.

Q. Counted twice? A. Yes.

Q. And that total was always figured out to be the same as the check? A. Yes, but there was sometimes a small balance that was put back in the safe.

Q. There was a small balance from the amount of the check? A. Yes.

Q. Why was that small balance held over, if you know? Do you know? A. Well, it had to be in the Museum case because very often the men were discharged or they finished their part of the work and were paid off in the meantime.

Q. That money was put in the safe for men who were paid paid off between pay rolls, was it not? A. It was.

Q. And you had some little cash that you kept in the safe to pay them when they would come up at odd times for it? A. Yes.

Mr. HILL: Your Honor, just in order to make it clear in the record, we offer here sections 5579 to section 5594, inclusive, revised statutes of the United States giving the creation of the Smithsonian Institution, being the whole of title LXXX 3 of By Statutes, second edition, 1878.

(It is hereby agreed that the sections here referred to may be used in any court at the hearing or in argument in this case.)

(910) HARLEY B. ASHLEY, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. McLANAHAN:

Q. Mr. Ashley, what is your occupation, sir? A. I am Master Carpenter at the new building for National Museum.

Q. And were you employed there during the spring of 1908 and during 1909? A. I was employed there continuously since September, 1906.

Q. Since September, 1906? A. Yes, sir.

Q. You were not specially employed on this Graham work except at different times? A. No, sir, except at the beginning when they were making arrangement for the cutting sheds and like of that.

Q. What was your duty then in the beginning of this work? A. Why, to confer with Mr. Pirie as to the amount of sheds required, and prepare schedules of lumber to build those sheds, and to supervise the laying of them out in the most economical manner.

Q. And you had charge of putting up those sheds and the lumber that went in them, did you not? A. Yes, sir.

Q. Did you inspect the lumber as it came in? A. I did.

Q. Do you know that the amount of lumber that you ordered was received? A. Yes, it was.

Q. You saw to that personally? A. Yes.

(911) Q. Did you have anything to do with the pay rolls—you had a certain amount of men under you, did you not? A. I had.

Q. Did you have anything to do with the pay rolls for those men under you? A. A few times when I had men that worked a fraction of the day, I think, that I had charge of the roll at the time that it was signed by my men.

Q. You mean men who worked for a fraction of a day on what? A. On the Graham contract work.

Q. That is, the men, who were regularly under you on the Government work, sometimes work a fraction of a day on the Graham work? A. Yes.

Q. How were these men designated on the pay roll? What were they classed as? A. If a carpenter, classed as carpenter, with the same check number as was given the men on our own pay roll.

Q. By going through the pay rolls you could pick out your men, could you not? A. Yes, sir.

Q. No stone cutters were under you, were they? A. No, sir.

Q. Only carpenters and what else? A. And laborers.
(912) Q. And those men, you say you had charge of the pay roll, did you see whether or not they signed it? A. Yes, the days that I was having them sign. Sometimes it would be a few of my men, the names appearing on the roll for that period, and I might send the men to Mr. McDonald's place while he had the roll there. He may have had some men employed at the times that I did and he would have the roll over there, and sometimes it was the other way.

Mr. McLanahan: If your Honor please, we want to call Marshal Langhammer, and ask him a few questions. We have sent for him.

The Court: Very well.

Marshal John F. Langhammer, a witness of full age, having been duly sworn, testified as follows:

Direct Examination.

By Mr. McLanahan:

Q. Mr. Marshal, will you state what is your office, or what is your occupation? A. U. S. Marshal.

Q. Do you know where the yards are that were occupied by and used by Mr. Frank F. Graham as stone cutting yards during the winter of 1906, and during 1907 and the early part of 1908? A. I can recall of 1908; in South Baltimore.

Q. Do you know where they are? A. Yes, I know where it is.

(913) Q. Did you ever visit the yard? A. Officially, yes, sir.

Q. Now, will you state just what the circumstances of that visit were? Why did you go down there?

The Witness: Yes, I went personally to the yard on official business.

Q. What were you doing down there?

Mr. McLanahan: If your Honor please, we want to prove mainly the condition of the yard and how he found it and what was there and all about the conditions down there.

The Court: Ask him that question.

Q. When was this that you went down there? A. In the spring of 1908.

Q. About what month, do you remember? A. I think it was in May, but I am not quite sure. In April or May I think it was.

Q. 1908? A. Yes.

Q. What was the condition of the yard when you went there? A. I found it contained a lot of stone and a number of cars loaded with stone.

Q. Was there any work going on at the time that you were there at the yards? A. No, sir, there was not.

Q. No work going on? A. No, sir.

Q. Was the stone that you saw there cut or uncut stone?
(914) A. Well, there was a good deal of uncut stone and a good deal of cut stone.

Q. A good deal of it? A. Yes.

Q. How much cut stone was there? A. I am unable to say.

Q. Was there as much uncut stone as there was cut stone? A. I think there was more uncut stone than there was cut stone.

Q. How was the stone in the yard? A. The stone?

Q. Was it in order or how was it? A. Well, yes, some was under cover and some was exposed.

Q. There was a good deal of stone there, wasn't there? A. Yes, a good deal of stone.

Q. Were the block of stones little blocks or big blocks? A. There were some small blocks but the majority were large blocks.

Q. Show us roughly how large some of them were, if you remember? A. I judge some of them were a little larger than the size of that table (indicating).

Q. How many cars were there loaded with stone there? A. Well, that I am unable to say. I judge there was something like about eight or ten cars there, I think, in my judgment.

Q. Eight or ten cars? A. I am not quite sure.
(915) Q. Did they have cut stone on them or rough stone? A. No, sir, they were rough stone.

Q. All rough stone on the car? A. Yes.

Q. Did you see anything else about the yard or around there that you took notice of? A. I saw the derrick and the boom lying across the track and part of the rail was taken up.

Q. Were they just lying there, this derrick and beam of the derrick? A. It was laying across the track.

Q. Was it loose? A. Oh, yes.

Q. It was entirely loose? A. Yes.

Q. You could pick up the derrick? A. It was a very large derrick you know.

Q. Were there any men cutting stone there in the yard at this time? A. Not any.

Mr. HILL: Your Honor, I have sent for certain papers which are part of the record of the court here and the messenger has gone for them.

Mr. MCLANAHAN: Do you know anything about any watchmen being employed down there at that yard? A. I do.

Q. By whom were they employed? A. By myself.

(916) Q. By yourself? A. Yes, sir.

Q. And can you tell the names of those men? A. One was Hilbert, the other was Maxwell, I think, and he took sick and I substituted another gentleman by the name of Bob Mathenia.

Q. Robert L. Marthenia I have on this list? A. That is right.

Q. Did they perform those services as watchmen? A. They did.

Mr. MCLANAHAN: If your Honor please, we offer the papers in the replevin suit in evidence in this case. It is the suit of the United States of America vs. Frank F. Graham, and is in the Circuit Court of the United States for the District of Maryland.

The COURT: For what purpose?

Mr. MCLANAHAN: For the purpose of showing that these stones had to be replevined, and that Mr. Graham did not deliver the stone up that was in his yard which belonged to the Government, and to show that the only way that we could get it was to replevy it, and they are also offered for the purpose of showing the appraisal by the appraisers at the time of the replevy suit, which appraisement shows just how many cubic feet of stone were in the yard at that time.

Mr. HARLEY: This is the case that is still pending in this court, is it not?

Mr. MCLANAHAN: Yes.

(917) The COURT: It is a replevin suit instituted to get possession of stone from Mr. Graham by the Government.

Mr. HILL: These papers are only offered to show the institution of the suit and to show by the appraisement in here—Mr. Langhammer was one of the appraisers—how many stones were taken under this suit. That matter is all settled.

The COURT: Is there any objection to that offer?

Mr. HARLEY: Yes, if your Honr please, as they have proven what stone was there by Mr. Piric's testimony, and the testimony of the invoices, if your Honor please.

The COURT: If the Marshal knows, or his memory is refreshed by looking at the schedule, he can testify to it.

(It is hereby agreed that the original papers in the replevin suit of the United States of America *vs.* Frank F. Graham in the Circuit Court of the United States for the District of Maryland here referred to may be used in any court at the hearing or in argument in this case.)

Mr. MCLANAHAN: Look at that schedule and tell us if you refresh your recollection just what the date was when you went down there and seized that stone and just how much stone there was there, if you can look at the schedule and refresh your recollection—your name is signed to the paper, I believe? A. It is.

Q. Just tell us about when you went down there? A. I see along about the 27th of April. I knew it was in April or May but it was about the 27th of April as I see.

Q. How much stone was there? A. Well, according to (918) the appraisement here it is 16,000—

Mr. HARLEY: Does that refresh your memory. Anything that you say we are willing to hear but we want to know whether it refreshes your memory so you can state independently of the paper how much stone was there? A. Yes, it does refresh my memory.

Mr. MCLANAHAN: How much stone was there, about? A. About 12,000.

Q. Cubic feet? A. Yes.

CROSS EXAMINATION.

By Mr. GAITHER:

Q. How do you know there was 12,000 cubic feet there? A. Mr. Gaither, by the appraisers.

Q. But you do not know it by your own knowledge? A. No, sir, not exactly, no.

Q. You did not take it yourself? A. No, sir, by the appraisers.

JOHN Q. SHEEHY, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. McLANAHAN:

Q. Will you state your occupation, please, sir? A. Chief Clerk of the Library building and grounds under Mr. Green. (919) Q. In Mr. Green's office? A. Yes.

Q. What occupation do you hold, or what office do you hold, and did you hold during 1906 and 1907, the fall of 1906 and during 1907 and 1908 and the first half of 1909? A. Chief Clerk on the Construction of the new National Museum building.

Q. And does that mean the work outside of contract No. 25, or does that include only contract 25? A. It includes contract 25 and all the work on the Museum building.

Q. You were Chief Clerk over the whole job? A. I was. Q. What were your duties as Chief Clerk over all this building? A. I had charge of all the details, paying off, overseeing the making up of the rolls, and making them up myself, checking the vouchers, and the details in general throughout under Mr. Green's immediate direction.

Q. And what organization was there there to do this work, how was the office organized? A. We had a force of clerks in the office, probably four or five.

Q. That is your office at the Library? A. Our office at the Library.

Q. And then down at the building? A. At the building we had one clerk, the Master Mechanic—

Q. Who was the clerk at the building? A. Mr. Lucher. (920) Q. Who was the Master Mechanic? A. Mr. Freas. There was a foreman and we had on contract No. 25 a time keeper, Mr. Hagan.

Q. That was after you began work on contract No. 25 in Washington for the cutting of the stone? A. It was.

Q. After you began that work you say you had Mr. Hagan as timekeeper? A. Yes, and assisting in the calculations of the pay.

Q. How did Mr. Pirie figure in it? A. He was the Master stone cutter in immediate charge of carrying out the work on contract No. 25.

Q. This Graham contract was entered into on October 23, 1906, I believe? A. It was.

Q. There has been some testimony as to Mr. Green being away after that time. Can you tell us just about when it was

that he was away and when he was in Washington? A. Mr. Green went away just before the middle of December.

Q. 1906? A. 1906, and returned about the middle of January, 1907. Then about the middle of March, 1907, he went away and returned about the middle of May.

Q. 1907? A. 1907.

Q. If you know, state why it was that he went away at (921) those times? A. In the fall of 1906, Mr. Green was very much run down from overwork. He had been there for the past two years almost continuously until midnight and practically every Sunday, and under the advice of his physician he let up for a while to recuperate his health.

Q. Was that the reason for his two absences that you have testified to? A. That was the reason.

Q. Was he away any more from that time on? A. I may add after the advice of the physician to recuperate he had been run down so much he had an attack of grippe.

Q. And that was the second time he was away after that? A. It was.

Q. During the time he had the gripps, how long was he away from the office? A. He was away at his home. I was in constant consultation with him at his home and visited his home probably two or three times a day.

Q. That was while he had this grippe? A. While he had the grippe.

Q. How long did that last, if you remember? A. Probably, well, about two weeks I should say.

Q. Now, was he away any more after the middle of May, 1907, up until the end of the work on contract No. 25? A. He was not, excepting that he may have gone on a business trip to New York for one day, or maybe to Philadelphia, but for just one day at a time, that was all.

Q. But the rest of the time he was there right along? (922) A. He was present.

Q. Who had charge of all the rest of the office, and the details there, when Mr. Green was away from the office? A. I had.

Q. You were in charge when he was out? A. I was.

Q. How about any setting plans that needed approval while he was away, who had the right to approve those? A. I would approve them in his absence.

Q. Who approved, if you can remember, setting plans Nos. 1, 2 and 3? A. I approved those by letter.

Q. By letter to whom? A. To Mr. Graham in Baltimore.

Q. Can you tell the date of that letter? A. December 21st, 1906, I think that is the date.

Q. This is already in evidence. This is the copy of the letter that you refer to when you say you approved setting

plans 1, 2 and 3, is it not? A. Yes, and "the drawings are now returned to you approved."

Q. That letter is the letter of December 21st, 1906, addressed to Mr. Graham and sent by Bernard R. Green, superintendent of Construction, per J. Q. S.?—are they your initials? A. They are my initials.

Q. After Mr. Green got back there in the middle of May, 1907, what were his hours there at the building? Did he go home in the middle of the day—just tell us how much work he (923) put in on the building. A. He usually left his home a few minutes before nine in the morning. Then he went to the Architects' office, Hornblower & Marshall, in connection with the Museum building work, and consulted with them, and then very often staying at the building, after leaving there, and then he would come to the Library. He would probably get there at eleven o'clock in the morning and would remain until—well, he would never leave earlier than six and very often eight and nine and ten o'clock.

Q. At night? A. At night.

Q. And Mr. Green had under him besides just this contract No. 25 the whole Museum building, did he not? A. He did, and the custody, care and maintenance of the Library building.

Q. What was the total contract price for that Museum building, if you can recall? A. The appropriation?

Q. Yes. A. Three million and one-half dollars.

Q. For the whole thing? A. Yes.

Q. Mr. Shelby, did you have anything to do with the payments made to Mr. Graham during the time that he was at work on this job? A. Yes, Mr. Green would direct that a payment should be made and I would figure up the quantity of stone that had been delivered.

(924) Q. You would figure up the stone that had been delivered? A. I would.

Q. What would you figure it up from? A. From the invoices which were sent from Mr. Graham to the building and corrected by Mr. Freas.

Q. Those are the invoices that are put in evidence with the red corrected figures of Mr. Freas on them, are they not? A. They are.

Q. And from those you made up the amount of payments that were due Mr. Graham? A. That is correct.

Q. Have you any list or record that you made showing how much stone you based those different payments on? A. I had a book in the office in which I entered it in columns so it could be conveniently added up. That is where I entered the quantities at the different dates.

Q. Do you know whether the entries in that book are correct with the invoices? A. They are.

Q. You are sure of that, are you? A. I am; I have checked them over at several times.

Q. They are correct with what figures on the invoices? A. The red figures.

Q. They are correct with Mr. Freas' corrected figures, is that it? A. They are.

Q. Can you show us that book?

(Book produced.)

(925) Q. Is this the book that you referred to, Mr. Shechy? A. This is the book.

Mr. McLanahan: We offer this book in evidence, if your Honor please.

(It is hereby agreed that the original book here referred to may be used in any court at the hearing or in argument of this case.)

Q. You call this book what? A. The invoice books. It shows the shipments not only on the Graham work but all other work on the building, steel work, cement and other building material.

Q. And the pages that refer to this granite that was shipped over to Washington from Mr. Graham's yard in Baltimore, are what pages? A. 85 and 86.

Q. Now, will you just tell us what those columns are on pages 85 and 86. The first column is "shipped" and underneath is May, June and July. A. That is the date taken from the invoice.

Q. The date it was shipped from Mr. Graham's yard to Washington, is it not? A. It is.

Q. And then comes the 14th, I suppose that is May 14th? A. It is.

Q. And load No. 1, and the numbers of the loads correspond with the numbers of the invoices, do they not? A. They do. We always in every contract, begin the first shipment with one. They are our own serial numbers.

(926) Q. And they correspond with the numbers on the invoices? A. They do.

Q. The next is the contents. A. It is.

Q. The next is the contract, that is according to what cube? A. That is taken from the quarry invoice, and it is quarry cube.

Q. The next column is the quarry cube column? A. In this same column is the number of pieces (indicating).

Q. And after that follows the quarry cub? A. Yes.

Q. After that I notice another column with "remarks"? A. They are the corrected figures given by Mr. Freas in red on the Graham invoices.

Q. "O. K.", what is meant by that? A. That means that the stone arrived at the building and was reported in proper condition. Here, on the 15th, the ninth load, one stone was damaged when it arrived.

Q. And after that, what is that there (indicating)? A. That is the date reported to the office as the car having been received at the building and the stone inspected to see whether it was in good shape.

Q. What are these out here in this last column? A. Those are memorandums made in checking the payments. That means Voucher 941 (indicating).

Q. That shows the payments to that date? A. First payment, 6-27.

(927) Q. June 27th A. Yes.

Q. That same testimony applies to the second page too, does it not? A. It does.

Mr. McLANAHAN: Gentlemen of the jury, this shows the car number of the load, and then this column shows the number of stones on each load, and the cubic contents of each load at quarry cube, and the next column shows the cubic contents of each load at the actual dimension measurement taken from Mr. Freas' corrected figures on those invoices in red. The next column shows the loads were received, and then the next column shows the date of that receipt. Then on the other page the same thing applies. There are one or two stones damaged here and there but they are usually all O. K.

Q. You testify, Mr. Sheehy, I believe, it was from that book, or from the invoices rather, which you checked up and saw that they were entered in that book, that you calculated the payments to be made to Mr. Graham? A. That is right

Q. That is correct? A. It is.

Q. Will you tell us at the date of the last payment to Mr. Graham, just how many car loads had arrived in Washington? A. I cannot say just when they arrived in Washington but I can say when they were reported as O. K., which was, at that time, 67 cars. They may have been in Washington but not reported. That shows 69 at the time of the final payment but (928) the last two were not reported at the office as received.

Q. March 4th and 5th, that is the time they were reported at the office, is it not? A. It is.

Q. So the date when the last payment was made to Mr. Graham you had the 67 car loads here, the 67th of which appears to have been reported in Washington to you on March 2nd, 1908, is that correct? A. It is.

Q. Will you tell us, if you can, just what the total cubic feet was in these 67 car loads which had arrived in Washington at the time of the last payment to Mr. Graham? A. 26,537 and 46/100.

Q. That is the total, 26,537 cubic feet and 46/100, is that right? A. That is right and 46/100.

Q. That is the total number of actual cubic feet of cut stone received from Mr. Graham at the time that the last payment was made to him? A. It is.

Q. Do you remember the date of that last payment? A. It was Friday, March 6th.

Q. Friday, March 6th? A. 1908. Mr. Graham received the check in my office.

Q. Is the amount of that check shown on the last voucher we had here in evidence? A. It is.

Q. After Mr. Graham quit work here in Baltimore what
(929) were your duties with regard to the payment for work, etc., done in Washington, and for materials furnished in Washington? A. On account of this contract?

Q. Yes, on account of this contract No. 25? A. The same such regular work as on the building. The procedure was exactly the same, excepting, of course, we charged work performed for Mr. Graham, or material furnished for Mr Graham, against his contract.

Q. You kept that separate, did you, from the other work that was going on? A. Yes, we kept it separately. I used rubber stamps to distinguish them.

Q. Are those the stamps that we have seen on a lot of these vouchers, "for contract of F. F. Graham"? A. They are.

Q. And that is the way you stamped all of the papers in connection with the Graham contract? A. It was.

Q. Therefore you kept those accounts separate from the other work on the building? A. We did.

Q. Did you have anything to do with the making up of the payrolls here? A. Yes, very often I figured them myself and saw them checked, and checked them myself; always saw that they proved up correctly.

Q. That they proved up correctly with what? A. With the time books.

(930) Q. Are those the pay rolls that you refer to (exhibiting pay rolls that have already been offered in evidence)? A. They are.

Q. Have you ever been over them? A. I have handled them, I do not know how many times.

Q. Where did you get the figures from that went on those pay rolls, if you know? A. The time was reported to the office in the small Library time books?

Q. Are those the small Library time books (indicating)? A. They look very much like the books.

(Books handed to the witness.)

The WITNESS: These are the ones.

Q. Those are the small Library time books? A. They are.

Q. And then what did you do? A. The time was transcribed from those time books into the larger time book.

Q. Are these the large Library time books (handing books to the witness)? A. They are.

Q. And then from the large Library time books, what was done? A. In connection with the making up of the roll?

Q. Yes, the pay roll. A. Both time books were figured by different clerks—

Q. Yes? A. —and I saw personally that they checked out; if they hadn't checked out I found out the trouble my-
(931) self.

Q. And the time, as shown in these books, shows only the time of Mr. Graham's men, the men working on his job, is that correct? A. That is correct.

Q. Then you say you checked them over and saw that they tallied up yourself? A. Yes, very frequently I would figure them up myself.

Q. And they were always checked to see that the results were correct? A. Always.

Q. Miss Schauster testified she made up the pay rolls from the large book and checked them from the small book, is that correct? A. It is.

Q. Do you know anything about that personally? A. I do. I always saw that the rolls were checked with the time books that they did not use.

Q. In other words, if she made up the roll from the big time book you saw that they were checked from the small time book? A. Yes, and I always saw that they were correctly checked.

Q. Can you state whether or not they were made up correctly, and can you state that of your own personal knowledge? A. I can. I have been over them myself, and additional proof of that is that they have all passed the auditing office of the Treasury Department.

Q. What was done after the pay roll was all made up as to the payment of the men? A. After the pay roll was made up a

check was drawn by Mr. Green, to his own order, and endors-
(932) ed by me. That was the evening before pay day. In the morning I went to the Treasury, always myself, and obtained the money. Then I brought it to the Library. The pay rolls were sent to the Museum after I got back from the Treasury and the money was put in the envelopes in the office.

Q. In which office? A. In Mr. Green's office at the Library.

Q. And were the pay rolls there when the money was put in? A. The pay rolls sometimes were there but they usually went down to the building after I got back from the Treasury.

Q. Where did you get your figures from in order to put the money up? A. We got the figures from the schedules, which were calculations from the roll, as to the number of pieces of different denominations of money was required. That was also a check on the roll and I also saw that they were correct.

Q. That was another check on the roll? A. It was.

Q. Then you say you put the money in the envelopes? A. Yes.

Q. Was that done under your supervision? A. Under my immediate supervision because I was personally responsible for the money and I very often handled it myself.

Q. And you were always present when it was being done? A. Always present.

Q. And you saw the money put up in the envelopes? A. I did.

Q. Was there any track kept of the money as it was put up in the pay envelopes at all? A. The schedule kept track
(933) of it. The schedule was made up per page of the roll, showing how many ten dollar bills, fives and ones, and fifty cent pieces, were required for that page. That money was laid out according to those quantities and the balance was put in the safe.

Q. After you got the money in the envelopes did you make any further balance to see whether everything was correct? A. There was usually a small amount left over.

Q. Why was that? A. There was a small amount which we carried in the safe for payments between pay days and I always *balance* that up and counted the money myself. I was the only one in the office who had charge of that money. The money for the Museum was kept in a sub-safe, in the large safe, and I had the combination of that.

Q. You checked that up and saw that the amount of money going in there was correct with the amount stated on the paper? A. Always.

Q. How about the payment to the men, the turning over of the actual money to the men themselves, did you have anything to do with that? A. I always took the money to the building, and sometimes when the force was very large, the Museum force, and when the force on the Graham work was large, it was too much money for me to handle as it would keep the men away from their work too long, so I usually had an assistant at those times.

Q. Who was the assistant? A. Mr. Rabbitt at times, and Mr. Hagan at other times. They were the only two besides (934) myself who handled the money.

Q. And you made all the payments to the men? A. I did.

Q. And handed out the envelopes to them? A. I did. They were identified when I paid Mr. Graham's force by Mr. Pirie who stood at the window as I handed out the envelopes to the men who presented their checks.

Q. They presented one of those checks (indicating)? A. That brass check. That was an indication to me, without referring to the roll, that that man had signed the roll because he did not get that check until he did sign the roll.

Q. Then when one of those men signed the roll he got a check? A. Yes. I did not have to check the roll to see that he had signed when the man had the check.

Q. Mr. Pirie, whenever Mr. Graham's men were paid, Mr. Pirie identified them in addition to those checks? A. He did; he was always present.

Q. You spoke about the small amount of money that you kept in the safe, cash money, so that any payments of those amounts that have been testified to would be where we have separate vouchers, would it not? They were for the men paid between the pay days? A. There were a few separate vouchers in there containing cash receipts, and under the system of the Treasury Department whenever we would pay in cash we would have to get that receipt, but when we paid by check we needed only the certificate on the voucher.

Q. In connection with the material furnished on Mr. Graham's contract, what were your duties during the time of fin- (935) ishing it up from March, 1908, until the time it was finished? A. As soon as the requisitions were received and approved by Mr. Green, I would immediately take steps to procure the material, very often by issuing circular letters for proposals, and in emergency cases by ordering from parties whom I knew kept material in stock and that it could be gotten from them immediately on ordering. In Government work that is all controlled by law, and particularly Section 3,709 of the revised Statutes.

Q. Look at one of those vouchers, this is voucher No. 1,399, and tell us just what appears on the vouchers, which show the regulations as to making purchases? A. The certificate reads: "I hereby certify "—this is the certificate of Mr. Green, the Superintendent, "I hereby certify that the above articles have been received by me in good condition, for the service performed as stated; That they were necessary for the public service; that the prices charged are just, reasonable, and in accordance with the agreement, and that they were secured in accordance with Sections 2 and B of the methods stated on the reverse hereof. Section 2 after advertising by circular letters, sent to five dealers. B. under written proposal and acceptance filed herewith." The Treasury Department has construed the sending circular letters to me in advertising.

Q. These sections appear at the top here, do they not (indicating)? A. They do. There is a letter section and a number section.

Q. "Method of or absence of advertising." (Section 3,709 of the revised Statutes.) 1. After advertising in newspapers. (936) 2. After advertising by circular letters sent to 5 dealers. 3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising. 4. Without advertising, it being impracticable to secure competition because of—

FORM OF AGREEMENT.

A. Under formal contract dated— 190 . B. Under written proposal and acceptance filed—herewith. (If with this voucher, so state, if not, indicate where.) C. Under less formal agreement. (State character.) Among the reasons which may be assigned as making competition impracticable (section 4 on this fold) are the following:

A. Under a formal contract for construction there arises a necessity for additional work practicable of performance only by the character. B. The articles wanted are patented or copyrighted and not on sale by dealers, but by the owners of the patent or copyright or their agents or assigns alone at a fixed and uniform price. C. There is only one dealer within a practicable distance from whom the articles can be obtained. D. Prices or rates are fixed by legislation, either Federal, State or municipal, or by competent regulation. E. Previous advertising for the identical purchase has been followed by the receipt of no proposals or only of such as were unreasonable and under circumstances indicating that further advertising would not alter results."

Q. They are the regulations of the Treasury Department? A. They are.

Q. And that appeared on the back of each voucher? A. (937) Yes, those forms are approved by the Comptroller of the Treasury.

Q. How about them,—you put in these orders for the material? A. I did.

Q. But you did not personally see the material received? A. Only in a few instances, when small material would come by express or mail to the office instead of to the building. I very often saw the material loose at the building and I recognized it and saw it as being what had been ordered.

Q. How did you know when to make up a voucher for material, what did you go on to make up your voucher for the material which was purchased? A. The daily reports of material received were checked up against the orders and when we found that the order had been completed we paid the bill.

Q. Those orders that you referred to, are they the yellow slips, the requisitions, that were put in evidence yesterday? A. No, you will find one attached to each voucher.

Q. You checked them up with these orders? A. Yes.

Q. You checked up the daily report of the material with these? A. Yes.

Q. They are in evidence? A. Yes.

Q. You are familiar with them, are you not? A. Yes,

Q. You have frequently looked through them? A. Yes. (938) Q. They were checked up with the orders that you sent out and you saw them checked up? A. I did.

Q. (Mr. McLANAHAN) Mr. Sheely, as I recall, when we closed yesterday I was asking you about your duties with regard to the daily reports for material received at the building, and I asked you, "They were checked up with the orders that were sent out and you saw them checked up?" And you answered, "I did." Now, these orders were the orders made up and issued when the requisitions were put in? A. That is correct.

Q. And when the report came to you from Mr. Freas you checked them up and saw that they tallied? A. Yes, sir.

Q. From what were the vouchers for material made up? A. They were made up from the checked list and particularly from the orders.

Q. Were they made up before the orders were checked up with the daily reports? A. No, afterwards. There never was a voucher made until the order was completed.

Q. Did you always issue a written order in the first place for material? A. Sometimes in emergency purchases we would telephone for it.

Q. Was there any order made then? A. There was a confirming order always sent afterwards.

Q. Have you examined all these vouchers that have been (939) put in evidence? A. I have.

Q. Can you tell us whether all the items on all these vouchers that have been put in evidence in this case are correct as checked up by you with the daily reports of the material furnished and the orders issued by you? A. They are correct.

Q. Mr. Sheehy, whose duty was it to look over the vouchers, if anybody's and to see that the items were correctly added up and so forth? A. That was my final duty.

Q. Did you do that? A. Always.

Q. With regard to all the vouchers offered in evidence in this case? A. Yes, sir; and all the other vouchers for work on the Museum building.

Q. And have you checked up all those vouchers offered here in evidence to see if they are correct? A. I have, and they are all correct.

Q. Have you your invoice book from the office with Mr. Freas' figures in it? A. This is it (indicating).

Q. You testified yesterday that the last payment made to Mr. Graham was based on 67 cars which had been received and reported in Washington up to March 2, 1907, and that your payment was based on 26,537.46 cubic feet by actual measurement of cut stone delivered up to that time by Mr. Graham. Can you (940) tell us how you calculated the last amount paid to Mr. Graham, the final payment to Mr. Graham? A. I remember I used the round number of 26,500 at the estimated price of $2.50 and that gave me a total of $200 over $66,000, and I called the whole estimated amount to date 66,000 and substracted 10 per cent and all previous payments, and then I paid the balance to Mr. Graham.

Q. You substracted the 10 per cent? A. Yes, sir.

Q. And you also substracted the previous payments? A. Yes, sir.

Q. And that balance was shown by the voucher offered here in evidence in this case? A. That is correct.

Q. Can you pick out that voucher?

The COURT: I think it is No. 1,292.

Mr. MCLANAHAN: Yes, sir.

The WITNESS: Here it is.

Q. And that is the way you arrived at that amount paid to Mr. Graham? A. Yes, sir.

Q. By calling 26,500 cubic feet at $2.50 per foot—

The COURT: That was $2,700 paid him on March 6?

Mr. McLANAHAN: Yes, sir; and then he deducted from the total the amounts of the previous payments and the 10 per cent, and that made the amount of this voucher, $2,700 and the total amount was $66,000?

The WITNESS: Yes, sir; that included the 10 per cent.

(941) Q. You made a payment of? A. $59,400.

Q. $59,400? A. Yes, sir.

Q. Will you look at this statement which I now hand you and state who made up that statement, if you know? A. I made up this statement.

Mr. McLANAHAN: I believe this is already in evidence, subject to exception. It is the statement of account in this case. We offer it again, in case there is any doubt about it.

Q. Is this statement a correct statement of accounts according to the accounts which you testified to? A. Yes, sir; it is a correct statement of the Graham accounts.

Q. Does it correctly show the amount claimed by the Government in this case? A. It does.

Q. On the second sheet are the vouchers of payments made to Mr. Graham. Have you checked up the amount and the number of vouchers paid to Mr. Graham with the amounts and numbers of the vouchers set forth on this sheet? A. I have.

Q. And are the amounts of the vouchers correctly set forth? A. They are; those are the 16 payments made to Mr. Graham and the amounts are correct.

Q. On the 3rd, 4th and 5th sheets of this statement appears a list of vouchers with the number of each voucher and with the amount in each voucher. Can you say whether or (942) not the amounts of the vouchers set forth in this list are correct as compared with the actual vouchers themselves? A. They are correct; there are four pages of them.

Q. Have you checked them over personally and know about it? A. I have.

Q. Do you know whether or not the additions are correct on those pages? A. They are correct.

Q. It shows the total amount of money actually paid to Mr. Graham to be $59,400 as you said a moment ago? A. Yes, sir.

Q. And the total amount of money paid in finishing up Mr. Graham's contract, the total amount of these vouchers is how much? A. $152,510.44.

Q. And that amount is correct? A. Yes, sir.

Q. The summary of the whole thing appears on the front page, does it not? A. Yes, sir; that is correct; that is the statement of account.

Q. You have already told us about the $59,400 and the $152,510.44. I notice this item of sundry payments made by the United States as per annexed statement of sundry payments, $213.21? A. That is the cost to the Government of stock spoilt in cutting by Mr. Graham and also stock spoilt by the Government in completing the contract after Mr. Graham had quit, and the third item was material purchased and (943) turned over to Mr. Graham for use on Contract No. 25.

Q. And the total of that is $213.21? A. Yes, sir.

Q. What is the total amount of the debits? A. $212,123.65.

Q. What credits on that statement are allowed to Mr. Graham? A. The amount of the original contract, $149,000; the amounts of allowance to Graham as per annexed statement of credits, $7,012.90, total amount of credits, $156,022.90.

Q. And that leaves a balance? A. Of $56,080.75, and then there is an unsettled claim, which is the amount disallowed by the auditor for the State and other departments and the Comptroller of the Treasury in settlement of voucher for $7,351.73.

Q. That is the freight voucher? A. Yes, sir.

Q. And how much is the amount there? A. On which the sum of $6,585.93 has been paid direct by the Treasury Department, leaving $765.80 which is not yet paid and is subject to litigation by the railroad company.

Q. And that $765 is given to Mr. Graham as a credit? A. Yes, sir.

Q. And that amount is deducted from the amount which you just mentioned as the amount due? A. Yes, leaving the net amount of $55,315.15.

Q. Here I notice, "Amount of allowances to Graham as per annexed statement of credits, $7,012.90." Those items appear on the last page of this account, do they not? A. (944) Yes, that is correct.

Q. The first item is the allowance on dome and miscellaneous items, $4,000. You have heard the testimony here as to the extension of the dome? A. Yes, sir.

Q. Is this amount included in that? A. Yes, sir.

Q. The next item is extra cutting on column and pilaster caps, $1,385.60. What does that mean? A. Mr. Graham on one or two caps he cut went down to a certain point in

cutting and from that point the carver was to take them; there is always a question as to where that point begins—

Q. Where the cutting stops and the carving begins? A. Yes, sir; and when the Government took over that job they cut it a little closer than Mr. Graham had done, and we considered it only proper to charge the same amount as Mr. Graham.

Q. You say the Government cut them a little closer than Mr. Graham had done? A. Yes, sir.

Q. So you gave him credit for that? A. Yes, sir.

Q. I notice the next item, 300 feet ⅞ inch steel hoisting cable purchased from J. L. Parsons, at 6 cents, $18; what was that? A. That was bought for the derricks and there was a little in excess of what was needed and the Government purchased it at same price.

The next item I notice is one grindstone, purchased from Harrison Supply Company, $21.31, and the drayage on one grindstone, 75 cents? A. That is one of the grindstones that the Government used and paid for including the drayage on it, the original price in Washington.

Q. And that was taken over by the Government and credit given for it? A. Yes, sir.

Q. The next item is labor cutting Jersey pink granite, $21.60? A. That is granite not included in this contract. Some of the cutters were put over on that work and in charging them on the time book they were put on the Graham roll and then taken off and Mr. Graham given credit for that.

Q. Who kept track of that when they were cutting on that Jersey pink granite? A. That was kept by the time keeper.

Q. Who, Mr. Hagan? A. Yes, sir; Mr. Hagan.

Q. The next item is cutting raglets, southern pavilion, $1,505.70? A. Cutting the raglets was not included in Mr. Graham's work.

Q. What are they? A. They are the little sinkages by which the copper flashing was fastened in.

Q. Do they appear on these plans (indicating)? A. No, (0464) sir; they would not show. It is a groove cut into the stone and the copper is fastened into that stone by means of lead which holds it tight.

Q. And you gave him credit for that? A. Yes, sir.

Q. Now, April 26, 1909, 2,100 feet (175 pieces) of Virginia pine used by Government after completion of work on Contract No. 25; also 760 feet (76 pieces) Virginia pine used by the Government after the completion of the work on Contract 25, all of above lumber second hand, $20.61. What does that refer to? A. That was some of the lumber used in the shed for protecting the workmen and stone cutters on the

Graham work and after the job was completed the Government used the lumber on some other work and gave Mr. Graham credit, at half value.

Q. Was the lumber new or second hand? A. Second hand Virginia pine.

Q. Then the next item of April 2, 4,302 feet Virginia pine, what is that? A. That is the same as the previous item.

Q. The next items are plumbing supplies used by Government after completion of Contract No. 25. There are several items, including black iron pipe, lever handle stop cocks and rough hose bibb. What are they? A. That was some of the piping material that was used in carrying the air from the compressor to the tools, and also for supplying water to the grindstone, and it was taken over by the Government and credited at about its full value.

Q. And the total amount of credits which you make on (947) all these items is $7,042.90? A. That is correct.

Q. And on the front page it is put down here among the credits given to Mr. Graham? A. Yes, sir.

Q. And you say you have made up this statement? A. Yes, sir.

Q. And that it is a correct statement? A. Yes, sir.

Mr. McLANAHAN: I will show this to the jury.

(Handing paper to the jury.)

Q. Mr. Sheely, did you make any average of the weight per cubic foot as shown from Mr. Bailey's figures on his book for the first 165 car loads of stone shipped from the quarry to Mr. Graham in Baltimore? A. I did.

Q. When did you make it? A. I made it last evening.

Q. Can you tell us what that average was? A. It was 227 and a small fraction pounds per cubic foot on the actual dimensions.

Q. That is a little under what Mr. Gailey made it? A. Yes, sir; I think it is.

Q. How did you arrive at that average? A. I took the average of each separate carload and added them and divided them by 165.

Q. Do you recollect having any conversation with Mr. Graham in Washington just about the time the bids were opened on this contract with regard to how many cubic feet there (948) were in this contract?

Mr. GAITHER: I object to that. It is prior to the making of the contract.

A. Yes, I had such a conversation.

The COURT: What is the purpose of it?

Mr. MCLANAHAN: Mr. Pirie testified that Mr. Graham stated to him a certain estimate which he had made when he made the bid, and Mr. Pirie told him, I think you are under on your estimate, and Mr. Graham said, No, I think I am right I have been over all these figures and checked it up. Now, I want to prove that this witness heard this conversation and I want to prove what it was and show that Mr. Graham underestimated the work in the beginning. I do not think it is very material, but it was at the times the bids were submitted; at the time he was making his calculations on which he made his bid.

The COURT: It is not with a view of altering the contract?

Mr. MCLANAHAN: Oh, no, sir; not at all. They have offered all sorts of excuses for Mr. Graham not getting ahead with his work, and we want to show that for one thing Mr. Graham under-estimated this job.

The COURT: I overrule the objection.

Mr. GAITHER: Note exceptions, please.

A. I did have such a conversation with Mr. Graham.

Q. When was it? A. After the bids were opened, the same day, I was talking with Mr. Graham outside Mr. Green's office in the hall and I asked him what his estimate was and he told me.

Q. How much did he say his estimate was? A. In round (949) figures he said it was 55,000, cubic feet and I asked him if he had not made a mistake because our office figures were around 60,000, and he pulled some papers out of his pocket and he said, no, I know it is all right because I checked it up and my draughtsman went over it.

Q. Who else was present at that conversation? A. Mr. Pirie was present.

Q. Did you have anything to do with the sending of the setting plans to the quarry and to Mr. Pirie? A. I always sent blue print copies of the setting plans to the inspectors at the quarry after they were approved.

Q. Can you tell us how soon after each setting plan was approved you sent out these copies to the quarries and to the inspector in Baltimore? A. In most cases they were sent out the same day. But, in some cases when the weather was

cloudy and did not permit of blue printing, they were sent out the next day.

Q. Were any of them sent out more than a day afterwards? A. No, sir, they were not, except when approved on Saturday and they were sent out on Monday, if the weather did not permit of blue printing on Saturday.

Q. But none went out after two days? A. No.

Q. Mr. Sheehy, have you a letter received from Mr. Graham on November 28, 1906, and directed to Mr. Bernard R. Green, signed by Frank F. Graham, if you have, please produce it.

The WITNESS: A letter dated November 28?

Mr. MCLANAHAN: Yes, that is right.

(950) A. Here it is, sir.

Q. Will you look at this letter and see whether or not this is the letter to which you referred? A. It is.

Q. And is this the enclosure referred to in that letter (indicating)? A. It is.

Mr. MCLANAHAN: This letter reads as follows::

"Baltimore, Nov. 28, 1906.

"Mr. Bernard R. Green,
Supt. Const. Nat. Mus. Bldg.

Dear Sir:

Enclosed find letter from the B. & O. R. R., in reference to shipment of stone, from Bethel to Balto.

"Kindly adhere to this route.

Oblige Respct.

F. F. GRAHAM."

And the enclosure is dated November 28, 1906, and is addressed to Mr. F. F. Graham. It reads as follows: (reading).

"Baltimore, Nov. 28, 1906.

"Mr. F. F. Graham.

Dear Sir:

"Rate on rough granite, released, carload, from Bethel, Vt., to Baltimore, is 17¢ per 100 lbs.

"Shipment should be routed via Central Vermont, Williamantic, N. Y. N. H. & H., Harlem River, N. Y., Cen-
(951) tral Railroad of N. J. P. & R., and Park Jct., Philadelphia to Graham's switch, Balto., Md."

"Yours truly,

"E. M. DAVIS."

Q. Mr. Sheehy, have you a letter dated December 10, 1906, from Mr. Graham to Mr. Green? A. Yes, sir; this (indicating) is it.

Q. You have a letter of that date, have you? A. Yes, this letter was received by me for Mr. Green.

Q. Received on December 10, 1906? A. Received on the 12th; it is dated the 10th.

Mr. McLANAHAN: This letter reads as follows: (reading).

"Baltimore, Dec. 10, 1906.

"Mr. Bernard R. Green,
Supt. Const. Nat. Mus.

"Dear Sir:

"In order that we may have some stone ready at the yard, when we have drawings all approved and are ready to begin cutting, would it be an inconvenience for you to take off some sizes from the drawings you have and order enough stone for us to begin on.

"After that we would be able to go right ahead.

"Respct.

F. F. GRAHAM."

Q. Do you know whether either you or Mr. Green wrote an answer to this letter to which I have referred? A. I wrote the answer. Mr. Green was away at that time.
(952) Q. Is this (indicating) the letter written in answer to that last letter by you? A. That is the letter, yes.

Mr. McLANAHAN: This is the letter of December 14, 1906. (Reading):

"It is the intention of this office to order all stock from the quarry on the approved cutting plans, copies of which will be

sent to the quarry, so that there will be no chance for misunderstanding or confusion in the furnishing of the rough stone.

"The Architects have just finished checking up your setting plans Nos. 1, 2 and 3; and they find so many corrections necessary that they think it advisable that the drawings be returned to you to look over and understand the changes, which are indicated in black pencil. Please do this and correct the drawings accordingly and return them to this office as soon as possible for final check and approval."

The WITNESS: Yes, sir; that is the letter.

Q. Now, will you look at this letter of July 15, 1907? A. This was dictated to me and written by me for Mr. Green.

Q. And do you know if this letter was sent? A. It was sent; I mailed it myself.

Q. Whose signature is that? A. Mr. Green's.

Mr. MCLANAHAN: This is the letter of July 15, 1907; it reads as follows:

"Washington, D. C., July 15, 1907.

"Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

"Sir:

(953) "Your letter of the 12th instant shows a misconception on your part as to your right to incur any expense for extras against the United States on account of your contract for the new National Museum building. You should read the contract carefully. It is natural that some reasonable additional cutting may be caused by peculiarities of the granite stock. It cannot be quarried so as to avoid something of this kind, and your contract requires you to cut and dress the stone from the particular quarry therein named.

"Yours respectfully,

"BERNARD R. GREEN,
"Superintendent of Construction."

Q. Mr. Shelby, have you the letter from Mr. F. F. Graham to Mr. Green dated February 15, 1907, and if so, please produce it? A. This is the letter (indicating).

Q. This is the letter received by you or by your office? A. Yes, sir.

Q. And you know personally as to the receipt of it? A. Yes, sir; I received it.

Mr. McLANAHAN: I will read this: (Reading)

"Baltimore, Feb. 15, 1907.

"Mr. Bernard R. Green,
Supt. Const. Nat. Mus.

"Dear Sir:

"I have received from the B. & O. R. R. a freight bill on (954) our car B. & S. 107,344, which is the first car of stone shipped me from Bethel, Vt.

"In your specifications with me you will find, 'The necessary Bethel granite stock, in net dimension blocks, is to be furnished to the Government by the present contractor, *free on board cars at the quarry in Bethel*, ready for the contractor for the cutting of the granite to transport it to his cutting yards for that purpose.'

"On the freight bill I have received, I am charged the rate of freight I have contracted with the B. & O. for, from Bethel to my yard in Baltimore and an additional $25.70 has been charged me by the people at the quarry, from the quarry to Bethel.

"As I have made an agreement with the B. & O. for transportation of the stone between Bethel and my yard, as per your specifications, this extra charge by the quarry must be made to the Government.

"Kindly look into this matter, Obliged.

"Respct. Yours,

"F. F. GRAHAM."

Gentlemen, have you our answer to that letter of February 18, 1907?

Mr. GAITHER: No, sir; we have not.

Mr. McLANAHAN: This (indicating) is the letter press copy of that letter.

Mr. GAITHER: All right, sir.

Q. Is this a copy of that letter which I just asked you about? A. Yes, that is a copy of it. It was dictated to me

(955) and redictated by me to Miss Schauston, who wrote it up.

Q. Do you know personally as to the sending of that letter? A. Yes, sir; it was sent.

Mr. McLANAHAN: This letter reads as follows: (Reading)

"Washington, D. C., February 18, 1907.

"Mr. Frank F. Graham,
"Calhoun St. & B. & O. R. R.,
"Baltimore, Maryland.

"Sir:

"Answering your letters of the 14th and 15th instants, I would say, first, that it is not expected that the few unusual rough patterns of stock understood to have come to you in the first carload from the Vermont quarry are any sample of the patterns that will generally be furnished. These came out of the winter quarries under considerable difficulties in order to help you get an early start at cutting. The Government inspector at Bethel is to see that the patterns sent you are reasonably close, as granite quarrying goes, and especially as the Bethel quarry can reasonably furnish.

"I will see also that the stone is full to pattern and free from defects. Then you will be held responsible for the safety and condition of the stone in transportation to your yards and accidents of cutting. Any other defects, such as flaws or seams that may possibly be developed by proper cutting, as judged by the inspector at your yard, the Government will insure. Of course, in all cases where stones may be condemned for any cause after being shipped from the quarry, you will be expected (956) to cut them into such other patterns as it may be practicable to do.

"As to your second letter complaining that you have been unexpectedly charged freight from the quarry to Bethel, in Vermont, there is nothing improper in this as I understand it, unless it may be the rate charged. Your contract requires you to freight the stone from the quarry to your yards in Baltimore and not merely from the Bethel station on the main railroad line.

"I am enclosing herewith for your information an extract from a letter which I addressed to the Thompson-Starrett Co. at Northfield, Vt., on January 31st, last, giving directions and advice as to the quarrying, inspection, and shipping of the

stock for the National Museum to your yards, for use under your contract.

"Very respectfully,

"BERNARD R. GREEN,
"Superintendent of Construction."

"(Enclosure)."

Q. (Mr. McLANAHAN) Have you the enclosed extracts from that letter? A. No, sir.

Mr. McLANAHAN: Will you look that up and see if you have that. We have the whole letter but we do not have just the amount which we sent to you, Mr. Gaither. Have you a letter from Mr. Bernard R. Green to Mr. Frank F. Graham, of February 20, 1907?

Mr. GAITHER: No.

Q. (Mr. McLANAHAN) Mr. Sheehy, will you find the copy book copy of that? A. Here it is.

(957) Q. Do you know that that letter was sent, and if so, state what you know about it? A. That letter was dictated to me by Mr. Green and I wrote it myself and mailed it.

Mr. McLANAHAN: This is the letter of February 20, 1907. It reads: (Reading)

"Washington, D. C., February 20, 1907.

"Mr. Frank F. Graham,
"Chelsea St. & B. & O. R. R.,
"Baltimore, Md.

"Sir:

"I hear from the Thompson-Starrett Co., in Vermont, that they are using their best efforts to get cars to carry the stone from the Bethel quarry to your yards, but they say they are proceeding with poor success, while they have a large amount of stone piled under their derricks ready for shipment. Of course, the Thompson-Starrett Co. cannot be held liable for freight, and the B. & O. R. R. Co., which I understand is the one to attend to the matter, should be made fully aware that your interests are suffering if they fail to furnish cars promptly. What is wanted are gondola cars. Whether it is the B. & O. cars that are to be expected, or the Central Vermont, or others, I do not know. At any rate, it is a matter that you will have

to handle, and I think you may be assured that the Thompson-Starrett Co. and the Government Inspector at the quarry will render you all assistance possible.

"Yours very respectfully,

"BERNARD R. GREEN,
"Superintendent of Construction."

(958) Q. Is that (indicating) Mr. Green's signature? A. That is his signature.

Mr. McLANAHAN: That is all, if your Honor please.

CROSS EXAMINATION.

Q. (Mr. GAITHER) Now, you say you are chief clerk of the entire construction of this building? A. Yes, sir.

Q. You then had access to all contracts and all arrangements about the building itself? A. I don't know what you mean by that.

Q. You knew everything that was done concerning the building? A. In the office. I did not know of every brick laid or every stone furnished.

Q. That is what I meant. Who furnished all the stone for the rest of that building except the south pavilion? A. The Milford Pink Granite Company, Thompson-Starrett Company, North Carolina Granite Corporation, Frank F. Graham, Webb, Pink Granite Company, and the Herbert L. Brown Company of New York.

Q. How much of the stone for that building did the Thompson-Starrett Company furnish?

The WITNESS: Do you mean quantity or value?

Mr. GAITHER: Quantity and value both.

A. I don't just remember the figures.

Mr. McLANAHAN: They furnished some cut and some rough stone.

Q. Just look at the book which I now hand you and see (959) if you can refresh your memory about it.

The WITNESS: You are asking now as to the Thompson-Starrett Company?

Mr. GAITHER: Yes.

The WITNESS: Referring to rough stock or cut stone?

Mr. GAITHER: Well, how much did they furnish of cut stock? A. It is not totaled up here.

Q. Give us some idea; what was the size of the contract that they had for cut stock.

The WITNESS: Compared with what?

Mr. GAITHER: With the amount.

A. Compared with the value of the building it was not a very great thing.

Q. You saw the contract, didn't you—I am asking you now in dollars and cents? A. I think it was somewhere about $350,000.

Q. How many thousand cubic feet, about? A. I don't remember.

Q. You say you don't remember? A. I don't remember. It did not interest me particularly at the time. It was a lump sum contract.

Q. When was that contract made with them? A. In the fall of 1904.

Q. Fall of 1904; when was it completed? A. Fall of 1907.

Q. How much rough stone did they furnish you? A. About 67,000 cubic feet.

Q. They only furnished the rough stone for Mr. Graham's (960) contract, is that all? A. No, they furnished one or two pieces that we broke at the building.

Q. And the rest of it was all on Mr. Graham's contract? A. For that building, yes.

Q. And that was 67,000 cubic feet quarry stone that you paid them for? A. Rough stock; yes, sir.

Q. Paid them for at quarry measurement? A. Yes, sir.

Mr. HILL: I object to that question.

Mr. GAITHER: He has answered it.

Mr. HILL: Then, I move to strike it out. This is a lump sum contract and that question and answer implies that it was on another basis.

The COURT: I overrule the objection.

(Exception noted.)

(961) The WITNESS: Did I understand you to refer to the rough stock?

Mr. MCLANAHAN: What was the question?

(Question referred to was then read by the stenographer.)

The WITNESS: That is, paid the Thompson-Starrett Company.

Q. I ask you when was that contract made for the rough stock? A. It was in the first contract.

Q. Made away back in 1904? A. That was done to insure the getting of the same stone for the south pavilion that was in the remainder of the building all around. The plans for that portion of the building were not ready at that time.

Q. And your contract with them about delivering this stone was made with them away back in 1904; is that correct? A. I think so.

Q. Now, look at the book which you have produced there on pages 85 and 86 and tell us how many thousand feet you make it at quarry measurement that Mr. Graham cut? A. (962) 28,931 feet 11 inches.

Q. How many thousand dollars did you pay him for the work that he did? A. Paid him $66,000 less 10 per cent.

Q. Paid him $59,400? A. That is correct, net.

Q. At what rate is that per quarry stone?

Mr. MCLANAHAN: We object to that.

(After argument.)

The COURT: I overrule the objection, because latitude is allowed in cross-examination for the purpose of testing the witness, but this has no direct relevancy to the case. The payments were to be made as the work progressed, and that had to be a matter of estimate from time to time.

Mr. MCLANAHAN: We note an exception to your Honor's ruling.

Mr. GAITHER: Please answer the question.

The WITNESS: Mr. Stenographer, will you repeat the question?

(Question referred to was then read by the stenographer.)

(963) A. I don't know, I never had any interest in it.

Q. Well, can't you divide 28,931 into 59,400? A. I think I can.

Q. That is what I asked you to do.

The WITNESS: You want me to tell you the price per cubic foot on the basis of 28,931.11, is that it?

Mr. GAITHER: State it according to your understanding of the question.

The WITNESS: Please repeat the question.

The COURT: Is that the amount actually paid to Mr. Graham?

Q. (Mr. GAITHER) I will ask you this question: At what rate is that per cubic foot at quarry measurement? A. $2.28, about.

Q. You included in that the 10 per cent? A. Yes, sir.

Q. What is it with the 10 per cent. deducted?

The COURT: You can do that figuring yourself.

Mr. GAITHER: Then, let us have Mr. Pirie's statement.

The COURT: That 10 per cent. is not taken off, anyhow; it is reserved.

Q. (Mr. GAITHER) Now, look at this statement which (964) Mr. Pirie produced here stating 67,543 quarry measurement of stone that he claims covered the whole contract. Tell us if you subtract from that the 28,931 whichever you choose, of the quarry measurement already referred to as having been done by Graham, according to your book—tell us how many thousand cubic are left? A. 38,611 cubic feet 5 cubic inches.

Q. That is the claim on quarry measurement, is it not? A. Yes, sir.

Q. Where is that paper with the total claim against us? A. Here it is.

Q. Look over that statement and tell the gentlemen of the jury what is the total amount of charge that the Government has made on that statement of yours for the work done by it, that is the total amount in dollars and cents? A. The total amount charged is $152,723.65 with a deduction for credits.

Q. Well, take off the credits. A. $143,915.15.

Q. Now, take off the freight charges, please, haven't you got them all grouped together in this statement of yours? A. No, sir.

Q. Wasn't the freight that you paid about $15,000? A. I don't remember, there was demurrage and freight.

Q. Well, take it all told, how much was it? A. I would have to go through all the vouchers.

Q. Who prepared this statement (indicating)? A. I don't (965) know exactly; it was prepared in our office. I don't know if it is correct or not.

Q. It was prepared in your office? A. I think so; it has all the earmarks of it.

Q. This says freight and car service, $15,858.98; take off that amount. A. $128,056.17.

Q. And you charged that for how many cubic feet of quarry stone?

Mr. McLANAHAN: We object to that.

(After argument.)

The COURT: I allow it as cross-examination. You may be able to show the jury that it is not conclusive. I allow it, though, for cross-examination.

Mr. McLANAHAN: Note an exception, then, please.

The COURT: Will you read the question, Mr. Stenographer?

(The question referred to was then read by the stenographer.)

The COURT: I do not think that is a fair question. The witness has not charged anybody anything. You mean what the account shows.

Q. (Mr. GAITHER) Your account shows that charge for how many cubic feet quarry measurement of stone? A. 38,611 feet 5 inches.

Q. Tell us what rate that is per cubic foot?

The WITNESS: What rate?

Q. Tell us what rate that charge is of $128,056.17 for 38,611 cubic feet quarry cube, per cubic foot?

Mr. HILL: I object, because it does not state the items of the rate.

The COURT: This is not really a cross-examination of the witness. It is imposing on him the making of mathemati-
(966) cal calculations—

Mr. GAITHER: This will be the last question of that kind.

The COURT: I will allow the question.

Mr. HILL: Your Honor rules that the question in that form comes in?

The COURT: Yes.

Mr. HILL: I note an exception, please.

Mr. GAITHER: Read the question, please.

(The last question was then read by the stenographer.)

A. About $3.31; that must be understood that that is a price which includes sheds, tool equipment, machinery and other things that the Government bought to carry on this work. It does not show in any way the actual cost of cutting the stone itself.

Q. Now, which cut the greater number of stones that were under one foot in any one dimension? A. I don't know.

Q. You don't know? A. No, sir; I am not a stone man.

Q. You had all the preparation of this case and you have been here every day? A. Yes.

Q. And you have had all these books in your possession? A. Yes, sir.

Q. And made calculations from them? A. A few calculations.

Q. And you cannot tell whether or not Mr. Graham four small stones under one foot in one dimension or whether the Government cut more? A. I don't know.

Q. What is the actual difference according to your book there between the quarry measurements and the actual measurements of the stones which Mr. Graham cut? A. About 1,522 cubic feet.

Q. Now, when were the last two shipments made by Mr. Graham under those 68 and 69? A. The 68 on March 4 and 69 on March 5.

Q. And they were all checked up as correct at that time by Mr. Pirie, were they not?

The WITNESS: Correct in what way?

Mr. GAITHER: As to the invoices.

A. Correct as to the number of stones and quarry cube.

Q. And sent to you, and when did you receive them in Washington? A. Sixty-eight on March 4 and 69 on March 6.

Q. Did you pay Mr. Graham anything on account of either of those two loads on March 6? A. No, sir; the stone had not arrived.

Q. And is that why you did not pay him? A. Yes,
(968) sir.

Q. When you knew that they were correct as certified by your inspector? A. They had nothing to do with it. The contract called for payment after delivery at the building on drays, the Government to remove the stone from the drays.

Q. So you absolutely refused to pay under the circumstances when it had not been received or rather delivered at the building? A. I know of that one case.

Q. Do you know of any other case? A. I don't know exactly, there may have been.

Q. Tell us from these vouchers here how many carloads were actually received by you from the 13th day of February until the 18th day of March. A. Up to the time Mr. Graham quit the contract there were seven and two received after.

Q. And how many cubic feet were there by quarry measurement on those last nine cars?

The WITNESS: Nine cars?

Mr. GAITHER: You said there were nine shipments.

The WITNESS: There were seven shipments.

Mr. GAITHER: Take the seven shipments, then, up to March 7—up to March 9—that is, up to the last two cars.

The COURT: You mean up to March 6?

Mr. GAITHER: Up to March 6, yes.

Mr. MCLANAHAN: Does that include the 68th and 69th cars?

The WITNESS: No, sir; that includes the 67th. It is 2,955.47.

Q. What were the actual measurements? A. Those are
(969) the actual measurements.

Q. Now, then, give us the quarry measurements of those same cars. A. About 3,069 feet.

Q. So what was the difference between the quarry measurements and the actual measurements on those last cars?

The WITNESS: On the seven cars?

Mr. GAITHER: On the last seven cars.

The WITNESS: No, on the last cars from 61 to 67?

Mr. GAITHER: Yes, on cars 61 to 67 that you have been testifying about?

A. 114.

Q. Now, Mr. Sheehy, when did you know when a car was shipped from the quarry to Mr. Graham? A. We received invoices, copies in triplicate.

Q. Where did they come from, who sent them to you? A. They were signed by the inspector, I do not know who put them in the envelope.

Q. Weren't they forwarded to you by your own inspector? A. I don't know whether they were.

Q. What was done with those invoices which you received? A. Two copies went to Baltimore and one copy stayed in Washington.

Q. Whom did you send them to in Baltimore? A. I always sent Mr. Pirie one, and if my recollection is correct, I sent it to Mr. Graham direct, or sometimes I put two in the envelope to Mr. Pirie for him to hand them to him.

Mr. GAITHER: I offer the letter of July 18, 1907, from (970) Mr. Bernard R. Green to Mr. Frank F. Graham.

Q. This is Mr. Green's signature? A. Yes, sir.

Mr. GAITHER: I now offer it in evidence. (reading):

"Washington, D. C., July 18, 1907.

"Mr. Frank F. Graham,
"Calhoun St. & B. & O. R. R.,
"Baltimore, Md.

"Sir:

"The Thompson-Starrett Company handed to the inspector, for transmittal to you, the enclosed 19 bills of lading and 1 postal card relating to the shipment of granite stock for the south pavilion of the Museum building.

"Yours respectfully,

"BERNARD R. GREEN,
"Superintendent of Construction."

"(Enclosures)"

The WITNESS: I know exactly what they were.

Q. What were they? A. Those were some papers that the Thompson-Starrett Company had been ordinarily sending to Mr. Graham, and they sent them around through us. They are not the papers or invoices of which I am speaking.

Q. Why did you send them to Mr. Graham? A. Because the Thompson-Starrett Company told our inspector that they were for him and the letter so states.

Q. So Mr. Graham got an invoice every time there was a shipment from you, and he got an invoice every time from (971) the Thompson-Starrett Company? A. I don't know anything about the Thompson-Starrett Company. I only know from our side of the matter. We sent one on.

Q. You sent one on? A. Yes, sir.

Q. Look at these yellow invoices in this book now which I hand you and which contains also receipts for freight, and tell the gentlemen of the jury whether those are the invoices referred to by you? A. I don't know, I never saw these.

Q. Look at the ones in July, you sent him 19, didn't you? A. So the letter says.

Q. Did they look like that (indicating), were they yellow sheets? A. They probably were, I don't know.

Q. You produce here Mr. Graham's letter about an extra charge that he discovered in February for bringing the granite from the quarry to Bethel? A. I don't know if there is an extra charge.

Q. Didn't you introduce such a letter here a few moments ago? A. Yes, sir.

Q. How much was that extra charge?

The Witness: The letter of February—

Mr. Gaither: Yes, February 15, 1907.

A. (reading) "An additional $27.50 has been charged me by the people at the quarry." Is that what you want?

Mr. Gaither: Yes.

The Witness: Well, I see that.

(972) Q. How much was that charge from the quarry to Bethel per hundred pounds? A. I don't know how many pounds were in the car.

Q. Well, how much was that charge per hundred pounds? A. He says here $27.50.

Q. Didn't you pay for any number of cars that came to you afterwards in Washington? A. Yes, but you are talking of Mr. Graham, now.

Q. Didn't they have the extra charge for the freight from the quarry to Bethel? A. I don't know what that was.

Q. Wasn't it 17 cents? A. The rate from Bethel to the quarries was 24 cents.

Q. I know if Mr. Graham didn't tell you that the rate from Bethel to Baltimore was 17 cents. A. This says that he paid $27.50 extra freight. I cannot figure it unless I know what the car weighs.

Q. You paid any number of bills. Produce one voucher now of a bill which you paid from the quarry to you in Washington.

The COURT: You remember, Mr. Gaither, the contract says that the stone is to be delivered free on board the cars at the quarry in Bethel.

Mr. GAITHER: Our construction may differ, but it is very material to show how much freight we paid. I do think that we can convince your Honor that this is material.

The WITNESS: This is the bill of the Pennsylvania Railroad Company.

Q. You never brought any by the B. & O., the same route (973) as the other? A. There may have been a few cars that came in that way; there were a few from Baltimore.

Q. Produce them. A. Some of the cars that arrived in Baltimore after Mr. Graham quit we had to pay the freight on them, and a lot of demurrage besides. Do you want them all or just this one (indicating)?

Q. You have produced a number of vouchers here which are simply from Mount Clare to Washington. Look at the last two vouchers and state what they show from the quarry to Bethel. A. It shows freight from the quarry to Bethel and it shows freight from Bethel to Jersey City and from Jersey City to Washington.

Q. That shows drayage, doesn't it? A. This is a freight bill.

Q. You read it "freight," didn't you? A. This is a freight bill, it is all for freight.

Mr. GAITHER: I will show that to the jury. (Handing paper referred to to the jury.)

The WITNESS: The drayage was over the Central Vermont Railroad from the quarry and then from its system to the New Haven and Hartford.

Q. And you read this "freight?" A. Well, you might have drayage on an ox team.

Mr. GAITHER: Yes, and you might have it on a race horse, too.

Mr. McLANAHAN: Do you dispute that that was taken down there on the railroad?

(974) Q. How much was the weight on that car? A. This is 48,000. I don't know whether this is the actual weight of the shipment or the minimum carload weight.

Q. How much was it? A. That is set 48,000.

Mr. McLANAHAN: We object again. We object because we cannot see that the amount charged for any leg of the journey, from Bethel to the station or to Jersey City. He might just as well ask him the amount charged from the Bethel Post Office to the Bethel station.

(After argument.)

Q. How much was the charge per 100 pounds.

The COURT: Let me see that paper?

(Paper referred to was then shown to the court.)

The COURT: You can answer the question.

Mr. McLANAHAN: We note an exception.

(975) Q. How much was that charge from the quarry to Bethel on 48,000 pounds? A. Two and a half cents a hundred.

Q. Look at the next car and state how many pounds there were there and how much that rate was? State the number of pounds first. A. 59,000 pounds.

The COURT: You do not contend, in point of fact, that there was any drayage?

Mr. GAITHER: No, sir; but we will show that it is called drayage the same as when they brought it down by wagon.

The COURT: I understood they put it on the same cars that came direct to Baltimore.

Mr. GAITHER: We haven't heard that yet.

Mr. HILL: That was the testimony.

The WITNESS: Yes, sir; they came through on the same cars, because I saw the cars come in at Washington and they were the same cars.

The COURT: There may be some question under the Interstate Commerce Act by which they are putting on a little extra charge and calling it drayage.

Mr. GAITHER: In the last question I am simply asking about the rate.

(976) The WITNESS: It is $2\frac{1}{2}$ per 100 pounds.

Q. Look at those two bills and say what the charge per hundred pounds is for the other items?

The COURT: For freight?

A. From Bethel to Jersey City $12\frac{1}{2}$ cents, and from Jersey City to Washington, 9 cents.

Q. I asked you on the last two? A. That is the last one.

Q. Do you know what the rate was from Jersey City to Mr. Graham's yard by any bills which you paid? A. It may be on some of the bills. It does not seem to be here. None of those bills are here.

The COURT: Mr. Sheehy, do you know the actual number of cubic feet of cut stone put into this building from the Graham contract? A. Only from the figures brought to the office, Mr. Freas' figure of 62,000 included everything but the ceiling of the portico.

Q. That is to be added? A. That is to be added, and I don't believe there is any figure in evidence showing the stone in the portico by actual measurement. It is all quarry cube.

Q. The amount you just spoke of was 62,000? A. Yes, sir; and I think the ceiling of the portico would figure about 2,000.

Q. Then you would say the total number of cubic feet in the whole contract was 64,000? A. Yes, sir; that is by actual measurement.

(977) Mr. HARLEY: That includes the extras?

The WITNESS: Yes, sir.

Q. (The COURT) And the price at which Graham agreed to do it was $149,000? A. Yes, sir.

Q. And you add to that— A. $4,000.

Q. It is $7,000, is it not? A. No, sir; only $4,000; that covers the extra stone in Y course and the drum of the dome.

Q. That would be $153,000? A. Yes, sir.

Q. Will you make a calculation to show how much per cubic foot that was. He was to put in those 64,000 cubic feet for $153,000? A. It is about $2.39 per cubic foot actual.

Q. And the amount of compensation he was to receive would have been at about $2.39 per cubic foot? A. Yes, your Honor.

Q. And as you made your payments, what rate did you estimate? A. $2.50, and we were considering just before Mr. Graham quit, a revision of our figures, and that was because of these estimates coming in in February. We were looking into the matter further then to see how the work was progressing and how the total was coming out with our estimate.

Q. If you continued paying him $2.50 per cubic foot and he had done 64,000 cubic feet, how much would you have paid (978) him altogether? A. $160,000.

Q. Then your estimate on which you were making payment was too favorable to Graham? A. Yes, sir.

Q. And you would have overpaid him the difference between $153,000 and $160,000? A. In the end we would have. But early in February we were considering the estimates.

Re-Direct Examination.

Q. (Mr. McLanahan) Mr. Gaither asked you about the 68th and 69th loads, whether or not you paid for them before the stone was actually received in Washington, and you said that you did not, although you had gotten the report of Mr. Pirie that the stone was all right and the stone did not arrive and you could not pay for it? A. No, sir; not only that, but the stone often arrived in a damaged condition and Mr. Graham had to make it good.

Q. And you did not pay him until he did? A. No.

Q. I understood in answer to a question asked by Mr. Gaither you said that after the Government took over the completion of this contract No. 25 in Washington, you brought the stone down from the quarry over the Pennsylvania and not the B. & O. Railroad. Can you tell us why that was? A. The Pennsylvania station was much nearer the building. The drayage from the B. & O. station was 60 cents a ton and from the Pennsylvania station 50 cents a ton. That is why it was (979) done. It was a saving of 10 cents on the drayage. The freight was the same over both roads.

J. WESLEY GILROY, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. McLANAHAN) What is your full name? A. J. Wesley Gilroy.

Q. What is your occupation? A. Deputy in the United States Marshal's office.

Q. How long have you been in that position? A. Five years.

Q. Did you ever visit the stonecutting yard of Frank F. Graham? A. Yes, sir.

Q. When was that? A. April 22, in the forenoon, I went there to seize the yard for the United States Government.

Q. What was the condition of the yard when you went there? A. The marble was scattered all around the yard and the boom was chained down to the track with a chain and lock, and there was a lot of marble out on cars on the Baltimore & Ohio Railroad.

Q. Do you mean marble or granite? A. Granite, granite.

Q. Were there any cars in the yard? A. No, sir; not to my knowledge; I don't remember that.

CROSS EXAMINATION.

(980) Q. (Mr. HARLEY) Do you know how many cars were on the track unloaded? A. I think there were seven or eight, I am not positive of that.

Q. (The COURT) Loaded or unloaded? A. Loaded.

Q. (Mr. McLANAHAN) Loaded with rough stone? A. Yes, sir; from the quarry.

Q. Was anybody working there at the time? A. No, sir.

Q. (Mr. HARLEY) What day was that? A. April 22, 1908, in the morning.

Mr. HILL: Your Honor, we offer the 28th Statutes at Large, page 21, Act of March 12, 1894, chapter 36, simply an immaterial amendation as to the Smithsonian Institution. That is the plaintiffs' case, if your Honor please.

(It is hereby agreed that the original 28th Statutes at Large, page 21, Act of March 12, 1894, chapter 36, here referred to, may be used in any court at the hearing or in argument in this case.)

(981) Mr. HARLEY: Before the plaintiff closes, Mr. Pirie was to have an opportunity to produce the lists called for at page 942 of the testimony. He was asked to give me a list of the separate stones. (Reading testimony.)

Mr. HILL: We have produced what my brother asked for.

Mr. HARLEY: Where are they?

Mr. MCLANAHAN: These are the papers which we produced at your request (indicating).

Mr. HILL: Your Honor, we produced those at page 1,200 of the record.

Mr. HARLEY: I ask Mr. Pirie be called to the stand so that he can testify as to what this is.

Mr. HILL: Your Honor, he has explained that, but we do not object to that.

The COURT: Mr. Pirie, take the stand.

WILLIAM PIRIE, a witness of full age, being recalled for further cross examination at the request of Mr. Harley, testified as follows:

Q. (Mr. HARLEY) In your cross examination at page you stated: "Yes, sir, I have them on separate pieces of paper; (982) I have not got them here.

"Q. When can you get them?

"A. Well, I might get it by looking it up; they are on sheets like that (indicating)."

Are those (indicating) the sheets which you produced? A. Those are the sheets.

Q. As indicating the 150 odd stones not in your books? A. Those are the sheets; yes, sir.

Q. Now, how many stones on that first page were cut by Mr. Graham, please, sir? A. Three.

Q. How many on the second page were cut by Mr. Graham? A. Not any.

Q. How many on the third page were cut by Mr. Graham? A. Not any.

Q. How many on the fourth page were cut by Mr. Graham? A. I would state that this simply shows that the stones were received, the papers on the desk show who cut them. This simply shows that they were received.

Q. Here are 90 stones on this fourth sheet? A. Yes, sir.
Q. Can you tell us who did cut them? A. I think so.
Q. By which papers? A. By those papers there (indicating).

Q. These? A. Yes, sir.

(983) Q. Out of those 90 how many were cut by Mr. Graham, please sir? A. I would state that the arch is shown here. That is what we call an upper ring and a lower ring. Those marked in the upper ring here in black ink are cut by Mr. Graham, and those in the lower ring and marked in red were cut at the building.

Q. Well, how many out of the 90, then? A. There were 90 large ones and 90 small ones. These are the 90 large ones.
Q. The 90 large arch stones? A. Or upper ring stones; I have counted them and I have the memorandum, but I can count them again.

Q. You can use the memorandum. Now, state how many of these 90 large arch stones referred to on this paper — A. 85.
Q. 85 were cut by Mr. Graham, you mean? A. Yes, sir.
Q. Look at the last or fifth sheet. They represent the lower arch stones? A. Yes, sir.

Q. Now, how many of them are there altogether? A. There are 96 of both.

Q. Only 90 on this sheet (indicating)? A. No, there are 90 here and three here and three there.
Q. I see. Then out of all of those on the fifth page there were cut by Mr. Graham? A. 41.

(984) Q. Forty-one? A. Yes, sir; forty-one.

Mr. HARLEY: I offer this in evidence, with your Honor's permission.

(It is hereby agreed that the original memorandum here referred to may be used in any court at the hearing or in argument in this case.)

Q. Let me see that memorandum of yours, please, sir? A. Here it is; it was taken off yesterday.
Q. That makes three and 85 and 41 which were cut by Mr. Graham on that paper, is that right? A. It makes 85 in the upper ring cut by Mr. Graham and 41 in the lower ring.
Q. And on the first page you said there were three? A. Yes, sir; but they are not here.
Q. That makes 129, then, altogether? A. Yes, I expect it is. It is 85, 41 and 3.
Q. And you are still, then, 35 to 40 stones short cut by Mr. Graham which you have lost somewhere?

RE-DIRECT EXAMINATION.

Q. (Mr. McLANAHAN) You just gave us figures as to the stones cut by Mr. Graham as shown on that list, didn't you? A. Yes, sir.

Q. Will you tell us how many stones were cut by the Government as shown on this list? A. Yes, sir; on this page 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24—24 on that page cut by the Government. Then (985) there is 1, 2, 3, 4, 5, 6, 7, 8, 9, 10—10 cut by the Government on this page. Then these two pages—this sheet before me shows how many were cut by Graham and how many were cut by the Government. I have stated that Mr. Graham cut 85 stones in the upper ring and 41 in the lower.

Q. That leaves how many cut by the Government in each ring? A. Eleven by the Government in the upper ring and 55 in the lower ring.

Q. What is that total? A. I did not figure it up, but 85 in the upper cut by Graham and 41 in the lower cut by Graham, 11 in the upper cut by the Government at the building and 55 in the lower ring cut at the building.

The WITNESS: I would state for the benefit of the jury that those stones marked in red are the stones which the Government cut at the building, and those stones marked in black are those which Mr. Graham cut on all the four arches. I have checked them over with his invoices and I find they compare. I did not have it the other day when they asked for it, but we telephoned to the building and fortunately it was found where I had left it. Those stones had to be loose and in order for that I made these drawings to mark the stones on when they were cut. This simply shows that I received 96 stones in each ring. This shows that we cut 96 stones and it also shows who cut them.

Plans were here offered in evidence.

Mr. HILL: That closes our case, if your Honor please.

(986) CHARLES H. MYERS, a witness of full age, produced on behalf of the defendants, having been duly sworn, testified as follows:

By Mr. HARLEY:

Q. Mr. Myers, where do you live, if you please sir? A. 1712 W. Pratt Street.

Q. What is your occupation, if you please? A. I am an all round stone man, a granite cutter by trade and I have been employer, employe, superintendent and foreman in Construction Work for the last thirty years.

Q. Thirty years? A. Yes, sir.

Q. Where have you worked? A. I have worked around Baltimore the major part of that time, but I have occasionally made trips where there was granite work in progress.

Q. Have you done any work in Washington, please sir? A. No, sir.

Q. Now, you know something about the National Museum building—were you on that job at all? A. No, sir.

Q. You weren't on it? A. No, sir.

Q. Did you see any of the work? A. Oh, repeatedly, sir. I suppose for about eighteen months, during which time I went down on numerous occasions and watched the progress of the work.

Q. Where? A. At Mr. Graham's yard at the foot of Calhoun street.

Q. About how many times, if you please sir, can you say? A. I can enumerate, I suppose, in round numbers twenty or (987) thirty times; I kept no special account of it.

Mr. Hill: Twenty or thirty times? A. Yes, I could not tell exactly.

Q. (Mr. Harley:) Your home is about how far from Mr. Graham's yard? A. Not very far. I am working there now and I can walk home in less than five minutes.

Q. About five minutes walk? A. Yes.

Q. Did you see any of the Bethel granite at Mr. Graham's yards during those visits? A. I saw the white granite but whether it came from Bethel or not I could not say. The supposition was that it was the Museum stone.

Q. At all events it was the National Museum work? A. Yes.

Mr. Hill: We object to that.

Mr. McLanahan: How do you know that?

Mr. Harley: We will withdraw the question. The gentleman wishes to know how you know that.

A. Simply because it was the only white stone that was in progress there at the time. The other jobs were of gray granite. Being closely connected with the men working there I knew that the job went to Washington at the National M[illegible]

I had a conversation with Mr. Pirie in reference to it and he carried me up in the drawing room and showed me the drawings on the job.

Q. Now, what was the character of the stone which you observed there during that time, Mr. Myers, please sir? A. Extremely rough, the patterns were extremely rough.

Mr. McLanahan: On which, the white or the gray granite?

The Witness: I am speaking of the white stone alone.

(988) Mr. Harley: Limit your testimony to that white stone. What do you mean by extremely rough? A. I mean that the stones weren't quarried in any condition whatever for a stone cutter to make any practical headway on it.

Mr. Hill: That is the opinion of an expert on quarrying, if your Honor please, and there has been no testimony that he is an expert on quarrying at all. I object to that on the ground that before he can testify as to the quarrying of that stone, he must show that he knows something about it. He is only here as a stone cutter.

Mr. Harley: How many years did you work in stone? A. I started at the business in 1873 and have been at it continuously, with the exception of two years, when I was Labor Statistician in the State of Maryland.

Q. (Mr. Harley) Are you familiar with the cutting work on granite, Mr. Myers? A. Perfectly, sir. I was foreman for the firm of Bevans & Sons, when they erected part of the Government buildings at Annapolis, and had charge of that work.

Q. Are you familiar with quarrying methods? A. I am.

Q. What is meant by "dimension stone" in the cutting quarrying trades, please sir? A. There are three classifications of stone: Random stone, which means promiscuously sent; dimension stone means quarried to the sizes given within an inch and one-half to three inches; net quarrying means that where there is angle stone, either obtuse or acute, or where the stone is cut away, it is quarried so as to allow the granite cutter—when the diagram is handed to him, to allow the granite cutter to have enough stock in that stone to cut the dimensions (989) required out of it but to have no superfluous stone.

Q. That is net? A. Yes.

Q. There are three kinds, random stone, dimension stone and net quarrying stone? A. If you will allow me, the ordinary dimension stone and net quarried stone—between those two there is not much material difference when the stone is superficial stone alone, but where there is an angle or heavy undercuts, there is a difference between ordinary dimension stone and net quarried stone.

Q. How much leeway is allowed in the usages of the trade for net dimension stone in blocks, say, averaging 15 to 20 cubic feet? A. Well—

Q. (Mr. HARLEY) Is there any difference in the usages of the trade in cutting granite between the various kinds of granite, or does one rule apply to all granites? A. There is a difference.

Q. Tell us what you mean by there is a difference? A. Well, if you get a quarry of stone where there is a riff and a grain to start with, you cannot quarry that stone as close on the rise as you can on the grain. There is a difference in the composite, parts of granite. There is a material difference between, say, for instance, Mt. Airy, N. C., stone, with which I am perfectly familiar, and our Maryland stone, but it is so little that you have only got to exercise more carefulness in the quarrying of the two stones.

Q. Now, the usages of the trade as to cutting granite generally, what leeway is allowed for net dimension stone in blocks of say a ton each? A. I should say a stone to be quarried net ought to be drilled up to the size as near as possible (990) and then roughed to the dimensions required from the diagram, either by plugging or rough pointing, just enough to allow the granite cutter to get out of the stone what the diagram calls for.

Q. About how much would that be? A. Stone quarried net ought not to have over 2″ any way on it.

Q. Ought not to have over 2″? A. No, sir.

By Mr. HILL:

Q. If I understand you correctly, Mr. Myers, in answer to Mr. Harley's last question, you said that a stone quarried net should not have anything more than a 2″ allowance on it, is that correct? A. It is.

Q. May I ask you this: Would you say in your experience as an expert in granite work whether there would be any difference between a large stone and a very small stone, whether the size would make any difference? A. A stone with 20-ton in it, if the specifications called for the stone being quarried net, should not have any more on it than a stone of 4 cubic feet, because the net quarry is a specific term. It neces-

sitates getting the stone out as near as possible. I will cite a case as an example: Sometime ago I roughed out a statue for a—what do you call those men—sculptor, and the specifications called that it was to be roughed out net, and I went within a half an inch of the lines that he gave me to bring out the statue.

Q. Now, Mr. Myers, will you please tell the gentlemen of the jury what quarries you have worked in in getting out stone? A. I have never made a specialty of getting out stone in any quarry but I have been around quarries for years and years. I (991) had charge of one quarry in Howard County, Md.

Q. Am I right to suppose that you never had any experience in quarries excepting for this quarry in Howard County, had nothing to do with getting stone out of a quarry? A. Only that I was foreman for Bevans & Sons and I would make frequent trips to the quarry. We handled about 12,000 feet of stone and I would go up there to see that the stone was gotten out according to those dimensions. However, I am not posing as a quarryman.

Q. Where is that quarry in Howard County? A. It is in Howard County, Md., about four miles from Guilford.

Q. Is that known as the Guilford quarry? A. No, sir, it is four miles above the Guilford quarry.

Q. What sort of stone is there in that quarry? A. Gray granite, the composite parts of which are Horne blende, Feldspar and Michael.

Q. Will you tell the gentlemen of the jury please, whether or not you have ever been to the Bethel quarry? A. No, sir.

Q. Have you ever been to any of the New England quarries? A. Yes, I have been in Barre, Vermont, that is the granite center of the North, through Concord, through Maine, through Massachusetts as the National Union President of the Granite Cutters' Union, in company with the Secretary. We made the tour of all the New England States visiting the quarries from Maine down to Concord.

Q. How long were you there at the Barre quarry? A. I was there, I got in on the afternoon, that night, and left the next morning.

(992) Q. You were there one night? A. No, sir, I was there one entire day.

Q. Now, have you ever been to any other quarries in the South, have you ever been to the Mt. Airy quarry? A. No, sir, I have never been to that quarry but I have handled a lot of the stone.

Q. Is that an easy cutting stone or a hard cutting stone? A. It is comparatively easy taking our Maryland granite as a Standard. It is softer and easier cutting but more treacherous.

Q. Will you please tell me, if you know, how the Maryland stone in the quarry in Howard County, of which you have spoken, lies? A. I am familiar with the quarry at Port Deposit, and that is a Horne blending squeeze block. The grain lays up and down. In the Maryland quarries as a general thing the riff lays laterally.

Q. Is it level? A. Lateral.

Q. Is it level? A. Oh, no, some of it is level but it is like every other quarry. It has its ups and downs, but as a usual thing the grain is up and down.

Q. How is it in the quarry in Howard County? A. The same, the riff lays on a lateral.

Q Would you say it lays perfectly level or not? A. Oh, no.

Q. About how much of an inclination would you say there was there? A. Some stone might be perfectly level and some lie on an incline. In opening up a quarry you will find the stone in all kinds of shapes.

(993) Q. How much of an incline was there to the stone in the Howard County quarry? A. I could not specify. We could go and cut away some and drill almost the size you wanted but others again you would have to quarry out and split it.

Q. Did you do the quarrying yourself? A. I was there at the quarry and I had a professional quarry man under me. I had charge of the cutting department.

Q. What is the furtherrest from the level, if you can say, that you took out from that quarry? A. Approximately, some stones lay in the quarry at an angle of about 45 degrees.

Q. I am talking about that quarry? A. Some were as level as that table (indicating) but others were on an incline.

Q. Now, you have used the work "plugging", what does plugging mean, if you please? A. You take a stone where it is too heavy, the bedway, or face or anything you want to take off is too heavy for a man to go in and point it up, drill holes are inserted on an angle. There are wedges put in there and drove and it will riff more freely on the riff than on the grain. It will go down and take out a big scalp of stone.

Q. It will take out a big scalp? A. Decidely so, yes, sir.

Q. Now, you spoke about rough pointing? A. Yes.

Q. What would that be? A. Fine pointing means after you get the stone in condition, and you can put the pin hammer on it to get it in shape. Rough pointing, if you have a (994) stone four feet 4″ long and you had a couple of inches rough on the bed, and wanted to rough point the bed, you would rough it off and would have to go over it again and fine point it.

Q. Did you ever have to deliver from that quarry in Howard County any net dimension block in that shape, deliver

the stone cut? A. When an order for stone would come up there I would make them quarry it as close as the dimensions called for. I had them roughed off and put them in fairly good shape before I would send them to the parties ordering them.

Q. Did you deliver those *stone* to the parties in net dimension block, in a cut finished condition? A. Understand me, the word net wasn't used there, but whether the order would come up for a half dozen stones of a certain size, or any other size, if the quarry did not turn out the stones in reasonably good patterns, they were made good patterns by the bull set and the point.

Q. When you were in this quarry did you serve the stone to stone dealers or persons who wanted to use it, builders? A. To the man who was in the stone business cutting stone. Cemetery work was most of it.

Q. Did you say that you used this rough pointing on those stones at the quarry? A. If I could drill a stone within close enough I did not, but if a stone was in bad shape I would not allow it to go away without putting it in fair shape.

Q. Let me ask you just one more question about that: You would rough point, would you, even if it were going to a man who had to work on it, expressly the stone cutter? A. Yes, if any of the sections would be bad I would hear a protest from the man cutting the stone. Most all of the quarry-(995) men in Maryland sending stone extremely rough they make allowance for.

Q. Now, I want to ask you, Mr. Myers, as an expert, whether you consider pointing quarrying too? A. Not necessarily so.

Q. Do you consider rough pointing part of the quarrymen's business? A. Where the specifications would call for net quarrying, it would be the duty of the quarrymen to get these stones out in that shape.

Q. Would it be the duty of the quarrymen to furnish the net? A. If he accepted the contract for net quarrying.

Q. Let me understand you exactly, Mr. Myers, I would like to understand about your definition in regard to net dimension block. Take, for instance, a stone 2′ 2″ x 3′ 4″ x 8′. Now, would you tell me first, if you please, what you would think the cube of that stone would be, and then how much allowance on stone should be made to make it what you consider a fair dimension blockk? A. Do you want me to cube that stone?

Q. Yes. Take the net dimension block on the stone at the quarry with which you are most familiar? A. Give me the long side?

Q. 8′ flat by 3′ 4″ x 2′ 2″. Consider that as a block of granite coming from the quarry you spoke of in Howard County? A. I think there is about 49 cubic feet in that stone.

Q. 49 cubic feet? A. 49′ 4″, I make it.

Q. Suppose I were to say to you that there were 57′ 9″ in there, would you say I made a mistake or that you made a mistake? A. I would go over my figures again. 2′ 2″ x 3′ 4″ x 8.

(996) Q. Yes? A. I will go over my figures again.

Q. Do that. A. 56′ 2″ is correct.

Q. 56′ 2″? A. Yes.

Q. If I should say to you, sir, that is was 57′ 9″, would you think I am right or wrong? A. I think I have it correct.

Q. Please go over it again and see if you are right this time. A. I have got it this time, 57′ 4″.

Q. You are sure of that? A. I think so, yes, sir.

Q. If I should say to you that I believe it is 57′ 9″, would you still tell me you were correct? A. I cannot go over it again; I think 57′ 4″ is correct. In fact, I did it mentally more than on paper because I have not my glasses with me and I cannot see very plainly.

Q. That is close enough and I won't trouble you to go over it again? A. Thank you.

Q. What I want to ask you now is to take that stone from your quarry up in Howard County with those dimensions and make that cube. Now, how many cubic feet would that be which you would consider a fair net dimension block from which that stone would be cut? A. It is 2′ 2″ x 3′ 4″ x 8. Just add an inch or 1½″ to the dimensions of it. That is, say it is 2′ 2″ high, that stone quarried net ought not to be over 2′ 3″ *or* 2′ 3½.

Q. Can you make that calculation? A. I am afraid to (997) attempt it because I cannot see the figures without my glasses. You can add any proportion. If I had my glasses here in a little time I could do it by putting the additional figures on. I cannot see without my glasses and I haven't them with me.

Q. Would there ever be any stones at all of that size coming out of the quarry with which you were familiar in Howard County, in which there ever would be a proper allowance of more than 1½″ in your opinion as an expert? A. If a stone would come within 2″ I would try to get it passed, but then, understand, it would not be net quarrying. There is a distinction there, but in my opinion it would not be net quarrying. Net quarrying would be a stone quarried to get the stone out so as to give the stone cutter an opportunity to get the dimensions out with the diagram.

Q. Supposing the stone came from a quarry that was absolutely level, how would you get it out of the quarry. What tools would you use? Supposing you want to get a block of the cut dimensions that I have already given to you, how would you proceed to get it? A. By putting in drill holes and drill it into shape the first thing. Make the grain first if it is large enough to carry its weight and then riff it. There are generally ledges in quarries from three to eight—

Q. You have to drill out with the grain? A. Not necessarily, but it is all supposition work. The grain stops first and then you riff in afterwards.

Q. Suppose the stone doesn't split with the grain, what happens. Suppose you attempt to split across the grain, what happens to the stone? A. I have seen stone that would go right up in a heap, but those stones you won't find any manufacturer (998) that will accept those stones only on rare occasions. That isn't anything like net quarrying.

Q. What do you mean by a stone manufacturer? A. A man who cuts stone.

Q. Like Mr. Graham? A. Yes.

Q. You would call him a manufacturer of stone? A. Cut stone manufacturer, yes.

Q. Suppose that you have in your quarry up here—I am talking about the one that you are familiar with in Howard County—suppose that your stone lies on an angle of say, 45 degrees, and suppose that the grain runs perpendicularly—A. Yes.

Q. How would you go to work and get out a slab of stone from that quarry of these dimensions that I have all ready given you? A. If one side would run that way (indicating) you would be very apt to riff in here, and if it would run straight you would put some feathers in here again and take off the surplus here (indicating).

Q. On what angle would you do that? A. It depends on how the riff of it was.

Q. You cut out the shape of the stone but you wouldn't go all over it, would you? How much out of the way would the first block you took out be? A. That would be in reference to a stone of the dimensions I have already given you? A. You could not give any definite size because it depends on the angle and depends on how the first split would make it.

Q. How close would you lay your lines to the figures shown on the schedule for quarrying stone in that case? A. It (999) depends.

Q. I am just talking about under the conditions that I have already expressed to you? A. Well, Mr. Wheatley, who was under my supervision was the man that did the quarrying there and 2″ was ample allowance for him to drill on.

Q. Do you know that yourself, sir? A. Yes, I saw that.

Q. You saw him? A. I was not over there but I have seen in other quarries similar things and in getting up car load stone I have drilled on an inch and got good cut dimension stone out of an inch.

(The question "how close would you lay your lines to the figures shown on the schedule for quarrying the stone in that case" was then repeated to the witness.)

A. You must not misunderstand that. You must understand that in quarrying there are big ledges at times taken down and that stone is drilled into smaller stone. If you want to take a big ledge down there aren't any particular lines. The ledges are thrown down and drilled. In my experience, and as I say, I do not pose as an expert quarryman, but from my experience, being around quarries, etc., 2″ is the approximated average of laying off for drilled stone.

Q. Are you familiar with what are known as setting plans? A. I am.

Q. Look at these— A. Now, you have got me without somebody lends me a pair of glasses.

Mr. Hill: I have a magnifying glass—

The Witness: Mr. Bailey will loan me his.

(Glasses handed to the witness.)

Mr. Hill: I have a magnifying glass if those glasses (1000) won't do.

A. I can get along very well with these.

Q. Look at these. This is granite setting plan, portico columns, south pavilion, National Museum, Washington, D. C., this is square base No. 1. Now, look at that please, and state what the dimensions of that stone are as indicated there? A. It is 6′ x 6′ x 1′ 10″.

Q. Is that a large stone or a small stone? A. That would be considered—well, I have handled stone a good deal larger and a good deal smaller. It isn't a large stone or it isn't a small stone. It is somewhat beyond the average.

Q. As a quarryman, have you ever quarried stone of that size? A. No, sir.

Q. Never have? A. No, sir.

Q. In your experience in quarries, have you ever seen stone that size ever quarried? A. Oh, yes, and much larger than that.

Q. Let me ask you this question: Take again your quarry up in Howard County where the stone lies on an angle of about 45 degrees, and where the grain runs perpendicularly how would you lay out your lines to cut that size stone out of your quarry? A. I would make an effort if the top bed was decidely on an angle, I would make an effort to get a split under neath.

Q. You would get that split underneath? A. If there is a ledge there where a man could go in, I would put a riff of holes in there and drive it through.

Q. On a stone of that size, what would you consider the proper allowance for a stone cutter in order to produce a stone the cut size of that, to produce a finished stone? A. If the (1001) stone was to be quarried net 2″ or 2½″ not over 3″ at the utmost.

Q. 3″ would be all right? A. More than necessary.

Q. Would it be proper? A. If I had charge of sending the stone, and I had orders from those whom I was working for to send a stone net, I would certainly reduce it under 3″.

Q. Now, how many sides is that stone to be cut on? Can you tell by looking at the setting plan there how many sides that stone is to be cut on? A. I should say that all six sides were to be cut.

Q. Take a stone that is to be cut on all six sides, full and fine on all six sides, would there be any difference in the amount of allowance there in order to get a proper net dimension block? A. As I told you before it depends upon the requirements. If it was to be quarried net, I should think an inch on each side would be plenty after the stone was squared up, rough squared up.

Q. What do you mean by squared up? A. A stone might possibly have an angle here (indicating) and you would have to lay your lines up and square it up.

Q. The squaring up, would that be the quarrymen's work, or the stone cutter's work A. If the specifications called for net quarrying, the quarryman is supposed to have a man there to do that work.

Q. What implements would he use to square it up? A. It depends on the amount of rough on it. He would use a bull set or a drill—

Q. Is that bull set a quarrying tool? A. I have seen it used.

(1002) Q. In what quarries? A. I have used it in Howard County. In 1890 or 1891 I was Superintendent of the Gettysburg Granite Company and had charge of 50 stone cutters, but not of the quarry, and there were bull sets used there in the quarry.

Q. What kind of cutting was carried on there? A. Building work and cemetery work.

Q. Mostly cemetery work, wasn't it? A. No, sir, mostly building work.

Q. What people did you supply from that quarry? A. I merely got the stones out—the drawings would be sent up there and I got the stone out and shipped it, shipping some here to Baltimore, and some was put in the Mt. Hope Hospital.

Q. Did you ship cut or rough stone? A. Car loads in the rough and lots of it cut.

Q. What did you call the blocks when you sent out the rough stone? A. That would depend. If you would get an order for a car load of random stone you would put in any kind of stone.

Q. Suppose I would send you an order and say, send me down one block of stone, 2′ 2″ x 3′ 4″ x 8, I mean 2′ 2″ x 3′ 4″ x 8′. Suppose I would say send me down a block of stone so I could cut out a finished stone from it of the size I have mentioned, what would you call the finished stone that you sent me? A. That would be a dimension stone.

Q. A dimension stone? A. Yes, because the figures were specified there of the size you wanted it.

Q. What other kind of stone could you possibly send me? Wouldn't I have to always send you the dimensions of the stone? A. If you wanted dimension stone.

Q. What other stone could you possibly send me? A. If (1003) I send a lot of random I would send you anything in stone from 5 cubic feet up to 100.

Q. Then there are only two kinds of stone shipped from a quarry, random and dimension, is that right? A. No, sir, and then there is net quarried stone, which makes a finer degree of quarrying.

Q. You say that there are three different kinds of stone shipped from a quarry? A. Yes.

Q. Random stone? A. Yes.

Q. Dimension stone? A. Yes.

Q. And net dimension stone? A. Yes.

Q. I mean net quarried stone? A. Yes.

Q. Now, when I sent up to you and say, send me a block of stone from your quarry in Howard County, which when cut, will give me a finished stone, 2′ 2″ x 3′ 4″ x 8′, what is the name you would give the stone you sent me? Would you call it random stone or dimension stone or net quarried stone? A. I would call it ordinary dimension stone.

Q. Then that makes four kinds of stone shipped from a quarry? A. No, sir, just ordinary dimension stone if the figures are given.

Q. What is the difference between the ordinary dimension stone and net quarried stone? A. I withdraw the work "ordinary" and say it was all dimension stone.

Q. Under what circumstances would you send me the net (1004) dimension? A. If it was specified to be quarried net.

Q. Only? A. Yes, what you term net I term neat.

Q. Let us go back to the original question. I write you a letter and I say, Mr. Myers, suppose you send me a block of granite so that when Mr. Graham goes and cuts this, he can cut a finished block cut on six sides to measure exactly 2′ 2″ x 3′ 4″ x 8′. Now, then, when you shipped me that kind of block, what kind of a block would you say it was? A. I would say a dimension stone.

Q. Now, then, what would I have to say in my letter to you in order to get a net quarried stone? A. Well, you would term it net—

Q. I am not terming it anything? A. What you say net, we term neat.

Q. That is another kind? A. No, sir, they are two synonyms, mean the same thing.

Q. What would you do? A. Then I would go as close to the size given as I possibly could to allow the granite cutter to get the stone out of it that he was supposed to get. I would feel it incumbent on me to allow no rough on that stone that was unnecessary.

Q. Any good quarrymen would do that, do I understand you to say that? A. Yes.

Q. Suppose it was in the middle of the winter when I sent my order up, would you consider that would make any difference possibly under any circumstances in the roughness of the stone I would get, in the quality of the stone? A. The weather might have some effect on the quarrying of the stone, but (1005) the weather would not have any effect on the order for what was given you.

Q. Explain that to the jury. How would it have any effect on the size of the stone? A. You mean the winter time?

Q. Yes. A. Stone doesn't quarry as perfectly true in winter as in summer.

Q. What is the difference? A. I suppose the atmospheric difference—

Q. I do not mean the cause. How does the affecting of the stone show, does it split up? A. In splitting it.

Q. In the winter, is the stone apt to split straight, or less straight than in the summer, when there is a frost? A. Less straight.

Q. What will that do to the size of the stone, make it smaller stone? Can you quarry closer in the winter than in

the summer? A. I do not think there is much material difference only you have to be extremely careful in the splitting of the stone in winter time, more so than in summer, but I do not know that it would make any material difference.

Q. I want to ask you this once more: Suppose I wrote to you and would say, send me a block of rough stone so when Mr. Graham cuts it for me on all six sides it will measure exactly 2′ 2″ x 3′ 4″ x 8′. Now, you would send me that stone and what kind of a block would you call it. A. That would be a dimension stone because the sizes were specified.

Q. That would be a dimension stone? A. An ordinary dimension stone.

(1006) Q. What would I have to say in my letter to you to get a net quarried stone? I do not exactly understand the difference between the dimension stone and net quarried stone? A. You would say that you wanted it to be quarried net.

Q. I would have to make that special in my order? A. Why, certainly, just the same between net and ordinary dimension stone as there is between ordinary dimension stone and random.

Q. There is that difference? A. Not that much difference because if you wanted a random stone and had no sizes specified, anything that was stone would be put aboard of the car running from 5 to 50 cubic feet, but if you wanted to get a job out, on a building or something of that kind for instance, you would specify the size of the stone.

Q. Suppose I wrote to you in this letter and asked you for this particular stone and would say that I wanted a net quarried stone, how much difference would there be in the size of that net quarried stone and in a what you call dimension stone. How much would you take off the dimension stone to give me a net quarried stone? A. Take the length 8′. If you sent up for a stone 8′ long and I would send it down 8′4″. I would not think that I was taking advantage of the man that was hiring me by sending an excess of stock nor would I think I was taking advantage of the man that I was sending it too, but if you specified net to save freight and work, I wouldn't allow but an inch.

Q. But an inch? A. About an inch after it was squared up.

Q. Then, if I understand you there would be 3″ difference between net quarried stone and dimension stone? A. Yes, sir.

Q. Now, from your Howard County quarry, Mr. Myers, (1007) you sometimes had orders for Monumental pieces, did you not? A. Yes.

Q. And you sometimes had orders for pieces for buildings, did you not? A. Yes, sir.

Q. Now, was there any difference in the shipments of the stone, the character of the shipment of the stone for those two purposes? A. We always made it a point to select the purest stock for cemetery work.

Q. Was there any difference in the closeness of the cutting? A. Oh, no.

Q. None at all? A. Now, if you will allow me to digress there.

Q. Certainly? A. Now, in cemetery work, for instance, we quarry a large space where the base called for 5′ square, you can make that base just as easily 5′4″ and lengthen the champers out and the people would get 4″ of additional stock more than they bargained for and it would make no material difference in the size.

Q. You mostly did cemetery work, did you not? A. No.

Q. I understand that in cemetery work the people did not make any objection if they got more stone than they bargained for? A. That is right, but where a man has a contract for a building, he wants the size as neat as he can possibly get it because if he doesn't get it as neat as it possible can be gotten there is more work on the stone and more labor and cost.

Q. Thank you very much. Can you tell me who is the owner of this quarry in Howard County that you have testi- (1008) fied to, at the present time, if you know? A. It did belong to—will you please tell me the name of the Appeal Tax Court Judge that died from Howard County?

Mr. HARLEY: Judge Hull.

The WITNESS: He lived up around Ellicott's Mills.

A SPECTATOR: Judge Jones.

The WITNESS: Judge Jones, it was his property. It was on his property.

Mr. HARLEY: He was of the Court of Appeals.

Q. (Mr. HILL) Tell us how a person from Baltimore would get to that quarry? A. He would go from here to Ellicott's Mills and then have to take transportation from there seven miles by wagon.

Q. What is the largest contract order that you ever shipped out from that quarry when you were foreman there? A. Indeed, I could not tell you, sir. I merely shipped the stone and merely cut the stone that was ordered to be cut and I would

ship down stone that may have been for two or three different contracts.

Q. I want you to think about that for a minute. If you don't know, of course you cannot say, but can you not remember what, for instance, was the largest order that you shipped out of there while you were working there—how long were you there? A. I was there a season.

Q. A season would be how many months? A. I stayed there from the Spring to the Summer. I could not tell you exactly.

Q. From the Spring to the summer time? A. Yes, from the Spring, during the summer.

Q. Spring to Summer time? A. I remember of going up there in cold weather and working sometime through the summer but I cannot tell you exactly the time.

(1009) Q. What year was that? A. It has been about eight years ago, sir.

Q. About eight years? A. Yes.

Q. Think a moment and see if you cannot tell me the largest order that you ever shipped from there. Was it a thousand cubic feet? A. No, sir, it wasn't a quarry of that size.

Q. Was it 500 cubic feet? A. I would reduce that.

Q. 100? A. Over 100.

Q. 150? A. Say 200 in round numbers.

Q. That was the largest order that you recollect shipping out of there, the largest individual order? A. Yes, say a couple of hundred cubic feet, but at the Gettysburg quarry we shipped carload after carload.

Q. What would be the biggest order that you shipped there? A. I shipped, I suppose, on an average of a car load of stone away from there a day while I was up there.

Q. On any one contract? A. That I could not tell you. The office was here in Baltimore and I would get orders to get out the stone and ship it.

Q. What was your position? A. General Superintendent.

Q. How long were you there at the quarry at Gettysburg? A. I went up there in November and stayed there the following spring some time.

(1010) Q. About six months? A. About five or six months, I guess.

Q. What year was that? A. It was after the Congressional Library job shut down on the granite.

Q. What occupation are you engaged in now? A. I am now running a machine cutting granite.

Q. Where? A. For the Baltimore Cut Stone Company under the supervision of Mr. Graham.

Q. The defendant in this case? A. Yes.

Q. You are employed by him? A. Yes.

Q. Where are his yards at the present time? A. Foot of Norris street proper, between Stricker and Calhoun streets, on the line of the B. & O. Railroad.

Q. What relation has he to this company? A. That is the company that is running that plant there, but what his relation is I cannot say.

Q. But you consider that you are employed by Mr. Graham? A. I would suppose so, he is the Superintendent.

Q. Now, you have testified, if I am correct, that during eighteen months you went to Mr. Graham's yard, about twenty or thirty times, is that correct? A. Oh, I guess if I had kept count of them it would have been oftener than that because I walked down there to watch the progress of the job and would walk down there on Sundays, maybe twice a day. Somebody would come along and I would go down there with them. I live on Pratt street, and I walked from the yard now to my home in about four minutes.

Q. And you were down there very frequently? A. Yes, (1011) I would go down there just to watch the progress of the job.

Q. According to your recollection how many different kinds of granite was there down there during this time that you have testified that you went down there? A. Only the two kinds, the white and the gray.

Q. What contract was the gray for? A. I could not tell you.

Q. Did you see how much of that gray granite was there? A. Well, suppose, the job judging from what was on the bankers would represent about 1/20 in comparison with the big job.

Q. You do not know what contract it was? A. No, sir.

Mr. McLanahan: Didn't you say that that gray stone was to go to Annapolis on your Direct Examination?

A. I do not know, sir.

Q. Didn't you testify to that? A. Oh, no, no, no, sir.

Mr. Hill: You spoke about being foreman for Bevan & Sons? A. Yes.

A. Yes.

Q. And that they shipped some granite to Annapolis? A. Yes, the Marine Engine Company.

Q. What granite was that? A. The Woodstock granite, what they term the big quarry, and part of it was from the Fox Rock quarries up there.

WALTER E. GRAHAM, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. HARLEY:

Q. Mr. Graham, what relation are you to Mr. Frank F.
(1012) Graham? A. Brother.

Q. You are his brother, are you not A. Yes.

Q. Did you work on the National Museum job? A. Yes, I worked from the start of the work.

Q. Where? A. At Mr. Graham's yard.

Q. In what capacity? A. I was foreman.

Q. You were foreman for whom? A. For Mr. Graham.

Q. What were your duties, Mr. Graham? A. What is that?

Q. What were your duties? You are a little deaf, I believe? A. Yes.

Q. What were your duties as foreman? A. Well, I got out the stone work, attended to the diagrams and things like that; I was general boss around the yard.

Q. Did you have anything to do with the office? A. No, sir, I didn't have anything to do with the office; didn't have time; I had enough to do on the outside.

Q. Where are you now employed? A. I am with Glough & Molloy.

Q. You are no longer with your brother? A. No.

Q. And do you remember on this National Museum job about the time that the stones began to arrive at the yards from the quarry? A. Yes.

Q. About what time, was it please? A. I could not tell you exactly what time or the month either.

(1013) Q. What season was it? A. I do not believe I know now but it was in the winter time somewhere along there, but I could not tell you exactly the month. I never bothered with any dates about it.

Q. The contract is dated, I believe, October 23rd, 1906? A. Yes.

Q. What did you do there at the yard during the Spring, Summer and Fall of 1907? A. How was that?

Q. I say what did you do at the yard in the Spring and Summer and Fall of 1907? A. It was the first year we started?

Q. Yes? A. We didn't do nothing; we layed there seven months without anything to do on this job.

Q. Now, you say without anything, as a matter of fact didn't you get a little something from the quarry? A. We got a couple of cars from this quarry.

Q. From the Bethel quarry? A. That was all.

Q. Do you know how many cars you did get up to the Fall of 1907? A. I could not tell you; I never bothered with the books at all.

Q. You never bothered with the books? A. No, sir, I was running the other end of it.

Q. When the stone did commence to arrive, what was its condition, Mr. Graham? A. Pretty rough, about as rough as you could get it from the quarry.

Q. I beg your pardon? A. About as rough as you could get it from the quarries. Some of it was boulders and wasn't (1014) quarried at all; it was quarried across the grain and there wasn't any quarrying about any of it.

Q. Explain what you mean by that, if you please? A. The way it comes out of the quarry—I ain't any quarryman, but I have been in many quarries quarrying stone. The stone when it comes out ought to come in this way, you understand, and the other side the other way (indicating). For a stone big enough to get a certain stone out of you could get three to make one, and some of them you couldn't tell nothing at all about it. It would take you a day to try one up. In quarrying some headers I had them drilling a day on them to get the stone out. Mr. Pirie knows all about it, he was there and tried them up.

Q. How long did this state of affairs continue? A. Well, they continued—they were worse at first and they slacked up a little and then come again off and on again, sometimes you got ashlar fair, and sometimes you wouldn't.

Q. As a rule what was its condition? A. What is that?

Q. As a rule what was its condition? A. Rough and rotten with it.

Q. Rotten, what do you mean by rotten? A. A stone that ain't no good. Nobody would accept it in Baltimore. Nobody in Baltimore would accept it. I lowered the faces three or four different times; you couldn't hold the edge on a rotten stone, any man knows that and it takes twice as much money to cut it. Any man in the business knows what I am saying is true.

Q. How long have you been in the stone business? A. Ever since I was 15; I am 45 now.

Mr. GAITHER: These photographs, may it please your Honor, were taken during the latter part of March—I think

it was about that time, anyhow it was when I first went up (1015) there to see the place.

Mr. HILL: What year?

Mr. GAITHER: 1908, and the photographer went along at the time and he took those photographs.

The COURT: After the work had ceased

Mr. GAITHER: Yes, your Honor.

Mr. HILL: We haven't any objection to them your Honor, as Mr. Gaither saw them taken himself.

Mr. HARLEY: We offer these nine photographs in evidence jointly and separately.

(It is hereby agreed that said nine original photographs here referred to may be used before any court at the hearing or argument of this case.)

Q. Were you present when these photographs were taken? A. Yes, sir.

Q. What do they represent, take No. 1 first? A. That represents the stone in the lower yard. Some one knocked the nosing off of it. I do not know who did it; I think Kauffman done it, I could not say.

Q. Who is Kauffman? A. He was a stone cutter working on it, and that was the spoiled stone.

Q. What is No. 2? A. That is outside, that is out in the big shed or in the workshop.

Q. What is No. 3? A. That is the same, but another view of it.

Q. What have you to say as to the stones exhibited there? A. A big base and things like that, columns.

Q. A little louder? A. Big base and things like that, columns, and almost all kinds of stone, cornices and a little of everything. That is them two bases on the railroad track, (1016) one of them weighed 19 tons, and a 22 ton crane tried to lift it and if they hadn't let go of it it would have upset it.

Q. What is it for? A. A Cap.

Q. What does it weigh? A. About 12 tons.

Q. It weighed 12 tons? A. I could not tell you absolutely about that but that B. & O. Crane if it hadn't let go it would have upset it.

Mr. HILL: And that weighed 22 tons?

A. I could not tell you that.

Mr. HARLEY: Was it the size it should have been?

A. It was too big that I couldn't lift it with my derrick and I slid them off.

Q. What do you mean by that? A. Those two stones were too large on the car when they came in that I could not take them off with our derrick and I slid them off and shot it to the track. The big crane moved them away and we never cut those stones. I could not turn around with them, and the derrick was at an angle of 45 degrees, standing up straight, as near as it could.

Q. Was it in anywise near the right dimension?

Mr. HILL: We object to that until this witness says what the dimensions of those stones should be.

Mr. HARLEY: You observed it, you saw that stone?

A. Yes, sir.

Q. Do you know whether it was near the dimensions? A. No, sir, it wasn't anywheres near it. I had the dimension then but I ain't sure of them now. I have been on 20 different jobs since then.

Q. You had the dimension at the time, did you not? A. We had it then but it was too large for the dimension, of course, then. I cannot remember these dimensions or what (1017) happened a year ago. I have been on many jobs since then and I cannot remember that. If the stone wasn't too large I wouldn't have said it but I remember the stone on account of it being that way.

Q. Did you measure the stone when it came? A. Yes, and I forgot what it was.

Q. Who measured all the stone when it came in? A. I did.

Q. Who assisted you? A. I took them off and give them to my brother.

Q. Mr. Frank F. Graham? A. Yes, and he took them to the office. Anything that wouldn't make was all wrong and anything that would was all right.

Q. What is this (indicating picture No. 5)? A. It is a base of some kind, I could not tell you, it isn't photographed so good. I think it is one of them bases. You see, there was so many different kinds of bases.

Q. Look at photograph 6. What have you to say as to the stones uncut there? A. That is where it was all piled up, that is when you couldn't move.

Q. You couldn't move, what do you mean by that? A. Too much rock in there, it was coming too fast then.

Q. How fast was it coming then at the time that came in? A. I could not tell you that to save my life. I didn't keep

no run of anything but the office kept the run of that. All I kept run of was in the yard; I kept run of all that but nothing else and all I done was to unload the cars and try them up and see whether they would make or not. There was stone there big enough to make but we had to take off enough to make another.

Q. Did you drill it off? A. We drilled it off because if was too big.

Q. Was the drilling a part of the stone cutter's work? (1018) A. No, sir, it is the quarrymen's work.

Q. But you had to drill it off. Where is the stuff now that you know that you drilled off? A. Lord knows. Some of it is up there I guess but a good bit of it was broke up and sent away and sold for twenty-five cents a load.

Q. Look at No. 7, what have you to say as to that stone at the bottom? A. That was way around in the shelter shed; I could not tell you exactly what that is; no, sir, I could not tell you exactly. You see them photographs they make them so you cannot tell them at all because there was so many laying there and I cannot remember every one.

Q. Look at photograph No. 8? A. That is piled down by the lower derrick on the B. & O., that is on the B. & O. ground and that wasn't on the place I was on; it was piled up.

Q. You had to pile it up A. It was piled off; that was on the B. & O.

Q. What stone is that, do you know, sir? A. D-K 45.

Q. That is No. 8. Is that in the right shape? A. Yes, that was cut ready to go, to be shipped. That stone is finished and that stone is O. K.

Q. What is this stone here in No. 9? Look at the stone. A. There are all kinds of stone there, columns and everything.

Q. What is that (indicating)? A. I could not tell you exactly; I could not tell you now how many there are of different kinds and shapes.

Q. What can you say as to the dimensions, if you know? A. Pretty rough dimensions in all of them.

(1019) Q. Pretty rough? A. Yes.

Q. You have been a stone man pretty well all your life, have you not? A. Yes.

Q. What is meant in the usage of the stone trades by random dimensions? A. Just quarried anyway and sent into you and you drill it up. That is the only way I found it.

Q. What do you mean by dimension blocks? A. That is the dimension.

Q. Explain it to the jury if you please. A. I cannot explain so much about it. The only thing is that dimension block ought to be quarried on 2″ along there (indicating) *pp*

of course, I do not know anything about quarrying, but in this job dimension—net dimension, when you are on a Government job, and I have been doing that work 20 years, off and on, when you are doing a job like that it has got to be cut exactly right and when you get on a job like that you must cut it up to specifications, and if you don't the Inspector won't receive the stone, and of course, I cannot say how the net dimension means but if it means the same to them as the end I was getting out it would be pretty tight on them, you understand.

Q. What in the usage of the trade, do you mean by net dimension?

The COURT: If you know?

Q. If you know?

The COURT: Do you know what is meant in contracts and in the trade generally by net dimension?

A. It means quarried close and with all the rough out off of it, and it is plugged off like lots of stone. If net dimension means net quarried stone, it means it is quarried close. You see, some would come in rough and some drilled and pointed up. (1020 That is what we had to do when the stone was too large and too rough, but it is according to how the Government holds you off on them. They do not make them quarry them right and they *above* them off on you and they send them in any way.

Q. In the stone trade what is the working season, Mr. Graham, if you know? A. How is that?

Q. In the stone cutting trade, what is the working season, if you please sir?

Mr. HILL: I object to that, if your Honor please, unless my brother says where?

Mr. HARLEY: I will say in Baltimore then. In the stone cutting trade at Baltimore what is the working season?

A. The working sheet?

Q. No? A. I cannot understand you.

Q. In the stone cutting trades what is the working season at Baltimore? A. I cannot understand you.

Q. How much work do you do in the winter time? A. Oh, season, yes, you do not do so much in winter here as you do in summer?

Q. Why not? A. Oh, I will tell you. Everywhere they try to keep their men off in winter time because the men can-

not do as much work in winterest time as in summer. Three months in the year all the machines are down and they cannot get the air—get the cold air—and it freezes and the men cannot go as hard.

Q. Does the cold weather have any effect on the stone? A. Yes, sometimes it gets too cold and it is freezing.

Q. Mr. Pirie, I believe, was at your plant for several (1021) months inspecting this work, was he not? A. Yes.

Q. Did Mr. Graham, in your presence, ever make any complaints to him about delay in receiving the stone from the quarry? A. At first he did, yes, sir.

Q. When? A. In the first part of the job he was after the stone, you know, like every other job. I cannot give you the date or the months as I did not keep that end of it.

Q. Do you know when the stone did commence to arrive right, in proper quantities? A. I could not tell you.

Q. Do you know what season? A. I do not know what season it was.

Q. What was that? A. I say I do not know what season it was to tell you the truth.

Q. Do you know how long it was after the work had started? A. In the Fall when it started—it started to come somewhere along there, I know that.

Q. What had you been doing in the Spring and Summer? A. Nothing.

Q. Why not? A. We had no rock; we didn't do nothing because we didn't get the stone and all we had to do was to lay idol, and we put in the big boiler and fixed it up for the job, but the stone didn't come.

Q. When this stone comes in rough, tell the gentlemen of the jury what you have to do with it before you can cut it? A. It is just according to what sort of stone it is. If it is a square stone, you take it up and cut the first face off of it, put it on the machine. It makes no difference if it is a piece of (1022) moulded work or anything else. You always have one surface to go by and work the patterns in afterwards.

Q. Suppose it comes in with superfluous dimensions what do you do with it? A. You mean dimension?

Q. Suppose it comes in too large, what do you do with it? A. We have to quarry it up, and drill it up, bull set and plug it up or point it.

Q. These gentlemen do not understand what you mean by that. Will you explain it? A. If a stone comes in like that, and be a flat surface and would come in lopsided, we would have to set it up and put the big hammer on it and set it up, put our plugs in, and take it out of line and then get it in the machine. If there is 2" rough it takes the machine just as

long to cut it off, or 3", or 4". It takes the machine three times as long to cut 3" as it does 1" and four times as long for 4" as it does 1". The machine don't eat any faster on the first inch than it does on the last.

Q. Explain to the gentlemen what you mean by drilling. You referred in your testimony to drilling, what do you mean by that? A. If a stone comes in rough we would have to drill the edge off of it.

Q. With what? A. Drills.

Q. Tell the gentlemen what a drill is. A. We have an air drill to drill holes all along and then put plugs in to break it.

Q. You drill a hole here and there all along? A. Yes, sir.

Q. How do you break the stone? A. Put a wedge in and drive it down and break it.

(1023) Q. What do you do? A. And if it goes good it is all right. Sometimes you have four or five inches and it runs out on you and then you would have to go plugging, and then you are up against it.

Q. What do you mean by plugging? A. Then you put holes in this way, putting them in a little on the slant, put your wedges in and plug out some pieces every time. If it wouldn't break good you put two holes in and break the pieces out, two in here (indicating) and you break one out at a time. If you put too many holes in and you break it too much then you have to be very careful. That is up to us when we get the stone.

Q. Whose work is that? A. The quarryman's.

Q. Now, suppoose the stone comes in rotten, what would you call rotten, tell us how you would work that? A. To tell you how you would work that, if you got a piece of bad stock that comes in, you line it up all around and get the lines around the edges, and you send it to the machine and if it is rotten it is liable to shallow up on you in the machine. In a rotten stone the riff is open wherein a good piece of stock the grain is tight and the riff is tight and therefore it is all right anyway you take it, no*t* matter how it is quarried. When you get a piece of rotten stone it is open and you can't get a top or edge on it—you can get it on but it takes you twice as long to do it.

Q. (Mr. HARLEY) Do you know the work your brother did on this pavilion C? A. Yes, sir.

Q. Are you familiar with all the work on pavilion C? A. Pretty well; yes, sir.

(1024) Q. What have you to say of the work your brother did in comparison with the work done by the Government?

Mr. MCLANAHAN: We would like to know the source of his information.

Q. Are you familiar with the whole of the work on pavilion C? A. The whole job; yes, sir; of course, I was not there when they finished it up, but I know what the work is.

Mr. McLANAHAN: Did he see the work as the Government finished it?

The WITNESS: I do not pretend to know about that.

The COURT: Is it the quantity or the quality about which you are asking?

Mr. HARLEY: No, whether it was more or less difficult or more or less expensive.

The COURT: Can he tell from the plans?

Q. What knowledge have you of what remained to be done to complete the job? A. It would just run about the same. The other work was heavy work. I don't see any difference in the price of it.

Q. How do you arrive at your opinion from the plans? A. Well, we were up in the dome here cutting this work (indicating) and that was expensive work.

Q. You were judging from the plans? A. Yes, sir; I was there getting it out.

Q. And you noticed what remained to be done by the plans? A. I know what remained. Of course I cannot say every stone, you know, the columns and pilasters and everything else.

The COURT: You may proceed.

Q. (Mr. HARLEY) What have you to say of the comparative expense of cutting that part which your brother cut and that which was cut by the Government? A. There wasn't any difference, it was the same right way through.

Q. What do you mean by the word "poxing"? A. They (1025) sent stone that would be a good pattern on this side (indicating) and then they would drill a hole in there three inches deep and they would spoil that good side, the hole was in the front and then Mr. Graham, my brother, had the trouble. I don't see why a man will spoil a good side like that. It was all spitework—

Mr. HILL: I object to that answer. Don't say that, you do not know that.

The WITNESS: It looks like it. We would send a man to go over that surface and then he would hit that hole and spoil

that surface and you would have to take another side. What was good they spoiled by poxing.

Q. What was the character of the stone as it was received from the quarry at the time your brother ceased work? A. Well, it was coming pretty rough. There was plenty of it and it was coming in bunches.

Q. What kind?

The WITNESS: What did you say?

Mr. HARLEY: What was its character? A. There was a little of everything; Cornish and ashlar and columns and bases.

Q. What shape was it coming in? A. Coming in rough.

Q. Was it coming in in net dimension blocks? A. No, not net dimension, there wasn't a stone in the job that was coming in net dimension.

Q. Can you describe it to the jury? A. It was all rough. It wasn't nothing like net dimension. It wasn't quarry dimension, even. Net dimension is a sawed stone, six sides; they (1026) run from 4 to 10 inches rough when you hit a rough side. None of them run under two.

Q. You told the jury something about making those measurements as they came in? A. Yes, sir.

Q. And giving them to your brother? A. Yes, sir.

Q. Did you take those measurements correctly? A. As nearly as I could.

Q. Were they substantially correct? A. Yes, sir; as near as I could get them; I did not give or take from anybody.

CROSS EXAMINATION.

Q. (Mr. HILL.) Mr. Graham, you said to the jury that you took the measurements of all the stone as it came in? A. No, sir; of the stone that I did take measurements—

Q. Well, what stone did you take measurements of? A. I couldn't tell you.

Q. Have you any memorandum that you kept at the time? A. No, not with me. I turned it over to Frank.

Q. Your brother? A. Yes, and they went to the office and Miss Cole booked them.

Q. Has your brother got them now? A. I don't know whether he has or not.

Q. But those were put in a book? A. I guess so. They ought to be, I sent them over to be put in there.

Q. (Mr. HILL.) Now, Mr. Graham, when the stone came into the *year* what was done first with it, who first made an (1027) examination of it? A. I did.

Q. Did you examine all the carloads that came in? A. Every stone that came in I examined it.

Q. You examined every one that came in? A. I guess I did. Of course, I was off two weeks sick and I might have missed then.

Q. Did you try them up? A. Yes, sir; and I called Mr. Pirie and had him go over them with me.

Q. Did anybody else help you try them up? A. No, sir; only Mr. Pirie.

Q. If you found the stone too rough you reported it to Mr. Pirie? A. Yes, sir.

Q. Did you report to him every stone— A. No, we reported it to him at first and afterwards we found out it was no use to make any further reports and we stopped.

Q. You found it was no use to make further reports? A. Not a bit.

Q. How many carloads of stone did you receive there? A. I don't know. I was just attending to the yard. I was not attending to that. They were booked in the office. All I done was to get the bill—

Q. Well were there 50 carloads? A. I couldn't say that; I only got the bill—

Q. But you examined all of those stones, you say? A. No, sir; not all. Mr. Addie and Mr. Pirie examined the stones.

Q. When you say the stone would make or not make, what do you mean? A. We would measure it up to see if it was all right in size.

(1028) Q. To see if they would size up? A. Yes, sir; there would be some stones came in there that would be big enough to make four stones out of and some were not big enough to make one out of.

Q. How many of those were there? A. I couldn't tell you.

Q. Were there five or ten of those? A. I couldn't tell you. There were some big headers that came in there that way, and some would not make—

Q. You say some would not make? A. No, I say they all would make—all except one.

Q. And why wouldn't that make? A. Because the head would not fill out. It ran over.

Q. How many stones would you say there were that you inspected that came in the yard there? A. I couldn't tell that; I didn't have nothing to do with the office.

Q. You could not remember that at all, could you? A. No, sir; if you were over on the other side of the street and the stone came in—all I did was to measure up the stone—I didn't have anything to do with the books.

Q. Well, am I correct in understanding you to say that all the stone you inspected for your brother that came in on this contract was either rough or rotten or poxed, drill-holed, is that right? A. Yes, sir; that is right.

Q. Either rough or rotten? A. Yes, sir,—not every one of them, there were a few good patterns.

Q. How many were good? A. Half of them.

Q. There were half of the patterns that you would have (1029) no objection to? A. They were all objectionable. If you read the specifications you will find that there is not a stone on the job that would come up to the specifications. If we would have held them to the specifications like they did us, there is not a stone there that would come up to the specifications.

Q. Will you look at the specifications and say where that is? A. It just says "net dimensions."

Q. Well, look at those specifications, please. A. I have looked over them a dozen times; that is a sawed quarry block—

Q. I ask you if you will look at those specifications and say exactly in what particular those stones did not comply with those specifications? A. In the net dimensions?

Q. Will you help me out by looking at them? A. I just looked at them fifteen minutes ago.

The COURT: He says that they did not come up to the requirements of net dimension.

The WITNESS: No, sir; they did not; because that if from $\frac{1}{8}$ to a $\frac{1}{4}$ of an inch—any stone from an eighth to a quarter of an inch.

Q. Any stone from an eighth to a quarter? A. Yes, sir; that is net dimension.

Q. Net dimension means any stone that is above the finished dimension one-eighth of an inch to a quarter of an inch? A. Yes, sir; what else could it be?

Q. Then, if the stone was an inch more than the dimension that would not be a net dimension? A. No, how could it.

Q. Then, when you say that the stones were all too rough (1030) they were not net dimension blocks because they were more than from an eighth to a quarter? A. Yes, sir; they were up to ten inches, that would be forty quarters.

Q. So, any stone over a quarter would be too rough? A. Yes, sir.

Q. And it would not be a good stone in that sense? A. No, they would not be according to the specifications, and they made us cut them out according to the specifications.

Q. Take the column drums, first. You think there should only be one-quarter of an inch on those? A. Certainly; we

would take the flutes out and put the molds in, according to net dimension.

Q. Now take the column capitals. Can you find one of the capitals to the columns on that sheet up there (indicating). Can you point it out?

The WITNESS: What, the cap?

Mr. HILL: Yes.

A. I think so, after I take a little time. There (indicating) is one.

Q. And you think that should not be more than one-eighth of an inch to a quarter? A. It ought to be roughed out to a quarter; they made us do it; on the second cap they tried to do it and I don't know whether they got that close or not, because I was not there when they finished it.

Q. Now, Mr. Graham, how long were you employed by your brother upon this work? A. I was on it from start to finish.

Q. You were on it from start to finish? A. Yes, sir.

(1031) Q. How long a period of time was that? A. I couldn't tell you; I didn't pay any attention to it.

Q. Were you at the yards all the time? A. Yes, sir; except when I was sick.

Q. And how long were you sick? A. About a couple of weeks, I guess.

Q. When was it that you were sick? A. That is another thing, I couldn't tell you. I never kept the date of it.

Q. What pay did you receive, if I may ask? A. Five dollars a day.

Q. What was your position? A. Boss of the stoneyard, that is all.

Q. You were a foreman? A. Yes, sir; that is all.

Q. Now, Mr. Graham, do stones that are to be cut by hand require as much allowance as stones that are to be cut by machines?

The WITNESS: How was that?

Mr. HILL: I asked you whether stones that were to be cut by hand required as much allowance on them as stones that were to be cut by machine? A. What is the difference, the specifications cover that.

Q. But let me ask you that. A. What is the difference in cutting by hand or machine.

Q. Then there is no difference? A. Not at all.

Q. So that there should be the same allowance for stones that are to be cut by hand as for stones to be cut by machine? A. The same allowance; I do not see any difference.

Q. You don't see any difference at all? A. No, sir.

Q. Did you ever complain to the inspector of stones that
(1032) were too small to be cut by machine? A. Yes, sir.

Q. How often did you make such complaint? A. I can't tell you.

Q. What was your objection? A. There might be a place running too close and another place that was three or four inches too big.

Q. Then they would run closer than one-eighth of an inch? A. Yes, sir; right up.

Q. Closer than one-eighth of an inch? A. Yes, sir; when they drilled them.

Q. And did you ever complain to him of any stones running closer than one-eighth of an inch? A. I don't know whether I did. I complained of some being shy, I know.

Q. What did you do when you complained of their being shy? A. We shifted them into different courses wherever we could.

Q. When stones are quarried up close does it take more time or less time to lay them out and cut them than if you had a liberal allowance? A. If they are quarried at the right size it is the easiest way to cut them.

Q. Quarried at the right size? A. Yes, from $\frac{1}{8}$ to $\frac{1}{4}$; if we got in a load of random I would have to lay it off and quarry it myself. I always drilled it an inch or an inch and a half, and no more; I always got a good pattern—

Q. You speak of quarrying yourself, what do you mean? A. Lining them up and then laying them off.

Q. And that is random, is it? A. Yes, sir.

(1033) Q. Well, have you ever done any quarrying at a quarry yourself? A. No, sir; but I have been in a quarry.

Q. But when you speak of quarrying you mean the work which is done in a stone yard? A. When I quarried up random.

Q. Would you consider that you did any quarrying on these stones for the Museum? A. I think I done a lot of it on them.

Q. Can you tell me again what you mean by quarrying on these stones, I do not know if I understand you? A. What I was talking about as random is a different thing from what you are talking about now altogether. Random is a stone that comes in rough. If we had a small job we would get the stone in and quarry it up. Now, as you are talking, if it comes 4 foot six and it was to be 5, then we would drill that end off—

that is what you mean—but if it come as I was saying, we would bull that end off, we would not drill it.

Q. But you said a few minutes ago something about the stone being sawed? A. Yes, sir.

Q. Now, was it your idea that this stone should have been sawed by you? A. No, not by us. We didn't have nothing to do with that. We were to cut the job.

Q. Who was to saw it? A. I don't know what the specifications called for.

Q. Well, what do the specifications say? A. It says net dimensions and that means sawed dimensions.

Q. Your idea is that the blocks were to be from $\frac{1}{8}$ to $\frac{1}{4}$ of an inch? A. Yes, sir; so that all you had to do was to put
(1034) your holes in and finish it up.

Q. Then under the contract all you had to do was the finishing? A. That is all we had to do according to that specification laying in front of me here (indicating).

Q. According to your understanding of the contract, what would you have had to do on the capitals of the columns? A. The column caps would have to be roughed down to a quarter of an inch.

Q. You would have to do that? A. No, they would have to do that; we would not have anything to do with that according to the specifications; we did not see the quarry, we bid on the specifications.

Q. And you say the Government would have to do that roughing down? A. Yes, sir.

Q. To one-quarter of an inch? A. Yes, sir.

Q. And you had nothing to do with it? A. No, sir; we did not have anything to do with the quarry at all. All they had to do was to give us net dimension blocks. That is what was right.

Q. Now, Mr. Graham, the specifications, section No. 31, has this to say: "The caps for the columns and pilasters are to be roughed out by the contractor in accordance with the full sized details or models which will be furnished by the United States for this part of the work, but the final carving itself, as well as that for the door head, is not included in the contract, but will be otherwise procured by the United States." Now, what was your understanding of what you had to do with the
(1035) column and pilaster caps under that specification? A. We would have to rough it out, but that does not cover the other one.

Q. What does that mean? A. We would have to rough it out to a quarter of an inch.

Q. You would have to do that? A. Yes, sir; if they compelled us to.

Q. In what condition should the stone reach you? A. From an eighth to a quarter of an inch. It would have to be close. It would have to come in a good square block, right up to the handle.

Q. Right up to the handle? A. Yes, sir; right up, in a good square block.

Q. (The Court) Would there be anything for the carver to do? A. Yes, sir; after they cut them up to the building then they carved them; they don't do that in the yard.

Q. (Mr. Hill) Let me ask you that over again, please: What condition should the blocks for the caps of the columns and pilasters come into your yard? A. They should have come within an inch or an inch and a half of it? A. Yes, sir; or two inches.

Q. If they had been an inch and a half would you consider that net dimension blocks? A. I would consider them dimension blocks.

Q. What is the difference between the two? A. Net dimension blocks they saw right down to the net dimension of the block. If you had $100 it would not be $99, it would be $100.

Q. Well, how much work would a net dimension block require? A. It depends on the finish.

(1036) Q. Suppose you had to finish it full and fine? A. Then it would depend on the mold.

Q. Suppose it was a plain stone? A. Then you would only have to bush it up.

Q. Suppose it was a column base? A. That would be a different thing entirely.

Q. Well, take a square base? A. That comes under the quarry dimension.

Q. You say it says quarry dimension here? A. Yes, sir; where it says that we have to rough it out.

Q. What do you mean by quarry dimension? A. I mean the dimension, that is the same as quarry dimension—

Q. Is there anything in the trade known as net dimension? A. I don't know whether there is or not. I see it in the specifications, so it must be.

Q. Did you ever hear that before in contracts? A. Yes, sir.

Q. What kind? A. Soft stone work.

Q. What contracts, can you tell me. A. I don't know, but soft stone work comes that way and it costs a little more to saw Indiana and it costs a little more to saw marble, and it costs a little more to saw granite. What is the difference how they call for it?

Q. Did you ever see any granite from the quarry come sawed? A. Yes, sir.

Q. Where? A. At Rome and Wilson's.

Q. Where is that? A. Well, right over here, they don't (1037) have much, but I have seen it come sawed. I never seen it—but I have heard it. I have been in the business all my life and I have heard it. I have seen a few pieces sawed in my life, but not many.

Q. Did you ever see any sawed in a quarry? A. No, sir; I was never in a quarry—not that quarry.

Q. You have spoken of drill holes and poxing of stone.

Q. What do you mean by poxing of stone, will you state that again, if you please? A. Putting a hole in it and spoiling it.

Q. Putting a hole in it and spoiling it? A. Yes, spoiling that side, just as if you knocked a corner off of a stone that would be call poxing it; they would have drill holes in it with dirt in them so that you could not see them and then I would line it up and send it to the machine man and the man with the machine would strike that hole.

Q. How many of those stones were there? A. I couldn't tell you, there were a good many in a big course there that could do you a lot of harm.

Q. Well, how many of them were there? A. Eight or ten of them.

Q. Were there less than that? A. I couldn't tell you.

Q. Or were there more than that? A. I couldn't tell you.

Q. You testified that that was done by the quarry people out of spite? A. I don't know whether they done it or not, but it was done when it come in the yard.

Q. Why did you say it was done out of spite? A. Because they took the first contract on this job and then Frank Graham went and bid under them and that is the reason that (1038) I think they done it for spite. When the first stone come on the job it was so rough that you couldn't see it. It got better because they kept kicking and hammering at them about it.

Q. Who kept kicking and hammering at them? A. Mr. Pirie.

Q. Then did he help you in the yard or did he hurt you? A. He helped me; he done everything he could for me.

Q. Who made the cutting schedules for the first part of the work in the yard?

The WITNESS: The cutting diagram?

Mr. HILL: Yes, sir.

A. Mr. Mason.

Q. Who is Mr. Mason? A. The architect.

Q. Was he down at the yard all the time? A. No, sir.

Q. Well, did any one else make them? A. I forgot now who made them; I think Mr. Mason until Addie came.

Q. And who is Addie? A. He is the stone cutter—the diagram maker.

Q. When did he come? A. You have got me now.

Q. How long was he there? A. Until the job was finished; I can't tell you how long he was there.

Q. I now show you photograph No. 1 which was filed in evidence by you on Friday. Please look at this photograph and tell what that stone is (indicating). A. That is D. K. No. 8—isn't that 8?

(1039) Q. Yes, that is No. 8. Now what does that D. K. refer to? A. That is the course it is in.

Q. Can you find that stone on these setting plans? (Indicating.) A. I guess so. It will take a little while finding it, there are so many of them. There (indicating) is D. K.—here it is, right here.

Q. Now, will you tell me from the setting plan, please the dimensions of that stone, D. K. 8?

The Witness: D. K. 8?

Mr. Hill: Yes, sir.

A. That does not give it to you. That gives you the top bed of it. This stone is this way (indicating). The profile shows that. On the full sized detail it is shown. All the architect does on that is show you the top bed of that; it is in a radius and—

Q. You say there is nothing on there to show that? A. No; this is all right; this is D. K. (indicating) and the detail which the Government furnishes gives you all you want to know. All I have to do is to get the radius to hit that stone.

Q. Could you tell me the dimension of that stone from this setting plan? A. Not without the full sized detail. The detail covers all this class of work. You cannot go by the figures on this. I got a job out like this on figures once before, and it was no good, you have to have the full sized details.

Q. Well, what does this mean? A. It is a section through course D. K.

Q. Does that give the dimensions? A. Yes, but you would have the detail to be sure.

Q. Can you take that and this and tell me the dimension (1040) of that stone D. K. 8? A. Not very well, not without the full sized profile.

Q. And who makes them? A. The Government; they give you a drawing for every mold in the job.

Q. The Government then gave you a full sized detail for D. K. 8? A. Not this way, but on the end view (indicating). Then you take the top, you see.

Q. When you examined these stones as they came into the yard, Mr. Graham, did you cube them? A. No, sir.

Q. You measured them? A. I measured them and sent them to the office.

Q. You never cubed them? A. No, sir.

Q. Have you ever cubed stones? A. No, not much; they have a book to do all the cubing by; you can find that out in a second.

Q. Are you accustomed to the cubing of stones yourself? A. No, sir; I never bothered with that in my life.

Q. Who did cube the stones at your yard? A. My brother and Miss Cole.

Q. That is Mr. Frank Graham? A. Yes, sir.

Q. And who was Miss Cole? A. She was the clerk there.

Q. She was there during the time of this contract? A. Yes, sir.

Q. And she cubed the stones too? A. Yes, sir.

Q. So nobody there but Miss Cole and your brother cubed (1041) the stone? A. There might have been somebody else—I don't know.

Q. You said that stone was broken? A. Yes, sir.

Q. Who spoilt it? A. I couldn't tell you sure, it looks like the stone that a fellow named Kaufman spoiled.

Q. Will you look at that and see if Kaufman did spoil that? A. I cannot say, I am not sure.

Q. How did he spoil it? A. He was cutting this band, sinking that band down there and lifted that off.

Q. Knocked that off? A. It is on the rift.

Q. So with the exception of the broken place on that stone what kind of a block would you call that? A. That has been under the machine and it is net dimension: it is not exactly net dimension now on the back.

Q. But that is a fair stone? A. Yes, sir; that is.

Q. But as it stands there that is a net dimension block? A. Yes, sir; that is pretty fair; you could not get that stone really net dimension because it is circular.

Q. It could not possibly be cut net dimensions? A. You could get it to a quarter of an inch of it, but not to a hair.

Q. You could get to a quarter of an inch of a net dimension block on that? A. Yes, sir; you could cut that down there (indicating).

Q. Now, I am going to mark this on this photograph (indicating). Will you look at this stone which I marked with a

green check mark and tell me how you would measure up a stone (1042) like that? A. I couldn't tell you that there; I cannot see all of that stone.

Q. I don't mean to give the exact dimension, but what I mean is, suppose you get an irregular shaped stone such as that stone which you see is almost triangular. Now, you said that when stones came in you measured them up? A. Yes, sir.

Q. Then, how would you measure that stone? A. Across the end and the head.

Q. You would measure from corner to corner? A. Yes, sir.

Q. Suppose you had a stone this shape and you were measuring that up— A. (Interrupting) You see that header (indicating) you have laid off there—that header was cut out at the quarry after all this kicking and they cut the cube down a little; after all this kicking was done they did drill a few of those ends off.

Q. They did better after you made the kick? A. They tried to do better, but that had nothing to do with this front; that (indicating) came all up here; I can show you how they came if you will hand me one of those pictures; there is one which is lined up (indicating); see all that rough on there; that don't show so much, but that runs—

Q. Is that the way the stone came from the quarry? A. No, I drilled that stone off; I slabbed that stone and mugged it with wire; a fellow named McGuire took two days lining that up and it should have been done in half a day; if there is 8 inches there it takes eight times as long as one inch, and if there is 4 inches, it takes four times as long.

Q. Would you say there were fifty stones in the contract that were too rough? A. No, there was about half of what we got hold of that were rough.

(1043) Q. How many did you get hold of? A. I can't tell you.

Q. Was it 50? A. I couldn't tell you.

Q. Was it 100? A. I couldn't tell you that either.

Q. How long were you working on this contract, how many months? A. I couldn't tell you that.

Q. You could not? A. No, sir.

Q. How can you say there were half of the stones that were rough, then? A. Because I lined them up; I took them off the car and on an average it was about half.

Q. On each car half would be rough, then? A. Yes, they would run about half rough.

Q. That is the way they ran on each car? A. Yes, sir.

Q. And you remember that because you examined each car? A. Yes, sir; I unloaded them.

Q. And each car would have about half rough? A. Yes, sir.

Q. And that would run all the way through the contract, would it? A. As far as we went; sometimes we got a good car.

Q. Why did you cease work at the yards on the contract? A. That I don't know; that was out of my line.

Q. Do you know why you stopped work at the quarry? A. No, sir; I was not any partner.

(1044) Q. But your brother told you, didn't he? A. He told me a little.

Q. And you told Mr. Pirie? A. Yes, sir.

Q. Will you tell us what your brother told you as to why he had quit work? A. Because it was coming in too rough and too fast; all getting piled up.

Q. Is that all? A. That they piled it all up on us; you could not even see the engine house; in two weeks they had so many cars around Mount Claire that you could not see anything but stones; they held it all back and shipped it at once.

Q. Shipped it at once? A. They must have.

Q. And your brother gave the contract up because of that reason? A. Not only that reason, I don't know what he gave it up for; there were objections all throughout the job; I don't know his mind, and I don't know what his private business was because I was only a foreman.

Q. You did not have much to do with the office? A. No, sir; nothing at all.

Q. You say he was kicking right from the beginning? A. Yes, sir; but it did not do any good at first; toward the last it did not do any good either.

Q. He kept on kicking, though, but it did not do any good? A. It didn't do any good; they just got stubborn.

Q. Will you look at this photograph No. 2 and say what kind of stones they are? A. They were right fair patterns on

(1045) top, but look down there (indicating) you see that?

Mr. Hill: Yes.

A. (Continuing) Now, we had to turn that over and use that side (indicating).

Q. Leaving out the hole there, would you say that they were too rough? A. They were fair for quarry dimension.

Q. They were not any good for net dimension? A. No, sir.

Q. They are not net dimension blocks? A. No, sir; they are fair for quarry dimension; here is one which is too rough; that is 18 inches thick.

Q. Will you put a circle around those; those are the ones that had holes in them. A. Yes, sir.

Q. These blocks which I have put the circle around are not net dimension blocks? A. No, sir; they are not net dimension; some that had good patterns were no good.

Q. Well, what stones were those that you say were too thick? A. That strut course.

Q. Can you tell me a little plainer where that is and what it is? A. That is the strut course up there (indicating).

Q. Strut course? A. Yes, sir.

Q. Well, I hand you photograph No. 4; I see upon a stone here (indicating) certain holes; are those plug holes that you testified about? A. Yes, sir; they look like it.

Q. Now, please mark that photograph with green pencil, (1046) those plug holes in those stones? A. Those are not the kind of holes I am speaking about. You could not see the hole there that I am speaking about. Those holes come right in the top of that surface and they fill it up with a plug—that is a hole bored in with one drill.

Q. See if you can find any plug holes on here? A. No, sir; because they are laying flat.

Q. Well, take these photographs and see if you can find any? A. Yes, that is a plug hole there (indicating).

Q. On No. 4 here you find a plug hole? A. Yes, sir; and that has been plugged to two.

Q. Please mark that with a pencil. A. All those are plug holes, you can see where they go in.

Q. And that one I have marked with the green pencil on No. 4? A. That is a plug there (indicating) I am not speaking of that kind (indicating).

Q. Let me read you section 32 of the specifications: (Reading):

"All joints, beds and builds must be full and fine joint cut and free from large plug holes, the axe to be freely used. They must be carefully worked from true and full margin drafts. All dimensions of stones given in the drawings and schedules are the full net dimensions without allowance for thickness of joints. The contractors will therefore allow for joints as follows: For all bed joints one-quarter of an inch (¼″) and for all end or vertical joints three-sixteenths of an inch (3/16″). Particular care must be exercised in the cutting that all the joints shall be exact and uniform. All joints must be fine cut and full within three inches (3″) of the faces of the stones and axed full for at least three-quarters of the bed and one-half of the build and end joints, the fullness prop- (1047) erly distributed and no deep or wide plug holes or cavities."

What does that mean in the specifications, that the contractor is to make the stones free from large plug holes? A. Keep all the beds and joints full.

Q. What do the specifications mean when they say that the contractor is to keep the stones free from large plug holes? A. Keep them full.

Q. But what does that mean? A. Take the mold out.

Q. Was it the contractor's duty to keep the stone free from large plug holes? A. Certainly; we could not have any holes in them.

Q. Do you think it was wrong for the stones to have these plug holes in them?

The WITNESS: What, those (indicating)?

Mr. HILL: Yes.

A. They just tried to cut a little rough off of that.

Q. But you testified that a number of these stones had large plug holes in them? A. No, one drill hole in the top, just enough to spoil the stone and make you turn it over.

Q. Now, I want to ask you the difference between a front hole and a drill hole? A. Ain't no difference at all; only you lay one on a slant; if you are plugging you set it this way (indicating); but these were not cut this way; they were just slabbed in different places; if they had been a line drilled across here (indicating) and then they plugged it up, it would be different, but they were not in a row.

Q. What do you call those drill hole or plug holes? A. Call them drill holes, but they are all the same thing.

(1048) Q. Then a drill hole and a plug hole being the same, what was your idea of the specifications when they said that the contractor should keep the stone free from large plug holes? A. That is, keep them free from all holes.

Q. Suppose the stone came to the yards and it had been soft stone, would you have plug holes? A. Yes, sir; you would have to plug the holes to get your cornices.

Q. Would you have plug holes in soft stone? A. Well, there would not be any occasion for it.

Q. But if it came sawed you would not have any plug holes in it? A. No, we would have a chance to plug it smaller.

Q. I say would there be any drill holes in it. A. We would have to plug it off, and if we took any chances and plugged it we would have lost it.

Q. But, as I understand it, according to your understanding, the stones should have come to you without those holes in them? A. Yes, sir; the same as to anybody else—

Q. Mr. Graham, did you ever complain or do you know that your brother ever complained to Mr. Pirie over here (indicating) about the stones not being properly sawed? A. No, he never complained.

Q. Why didn't he? A. Because they would not even bring in good patterns; they were not running as good as random; they were just coming in like they had been pulled right off the hill; there wasn't any quarry measurement to those stones at all; that is the ones I am speaking about.

Q. Now, in your yards there, who had charge of receiving all the stones that came in?

(1049) The WITNESS: When they came in?

Mr. HILL: Yes.

A. I measured them up.

Q. You saw the stone carloads first? A. I might not have seen them first.

Q. But as a general thing? A. Yes, sir; and I tried them up.

Q. Did your brother try them up? A. Yes, sir; sometimes; but I had to do it to see if the stone would make or not.

Q. Was he at the yard all the time? A. Not all the time.

Q. What other business was he engaged in at the time?

The WITNESS: Who?

Mr. HILL: Your brother

The WITNESS: What kind of business?

Mr. HILL: You say he was not at the yard all the time.

A. Well, he had to go down town sometimes.

Q. He was there every day, was he? A. Well, some days he was and some days he missed; he would go down to the country or something like that.

Q. Was he there every two or three days during the time that the contract ran? A. Sometimes he would go away and stay away two or three days.

Q. Was he there every week during the time of the contract? A. I couldn't tell you that.

Q. Who had charge of shipping the cars to Washington? A. I couldn't tell you that, the office attended to that.

Q. You did not do that? A. No, sir; I tried them up and saw if they would make.

(1050) Q. Can you say how many carloads of stone came in there in January, 1907? A. I couldn't tell you that.

Q. Can you tell us how many carloads of stone came in there in February, 1907? A. I couldn't tell you.

Q. How about March, 1907? A. I never kept any account. How can I say if I never kept any account of it?

Q. Have you any records here of that or has your brother any records? A. I don't know that; there was a record of it in the office but I couldn't tell you that.

Q. Can you say how many carloads of stone came in in May or June of 1907? A. I couldn't tell you how many cars there was at any time, first we didn't get any cars at all and then they come gradual and then they come in a hurry.

Q. Did you get any cars in July, 1907? A. I can't tell you that.

Q. Or in August, 1907? A. I cannot say that.

Q. Or in November? A. I don't know when they came in, but I know that it was a long time before they came in there.

Q. How about December, had you received any stone then? A. I don't know about that, the books will tell that.

Q. How about January, 1908? A. I couldn't tell you that.

Q. Or February, 1908? A. I don't know that.

(1051) Q. Did you think any stone had come in there by March, 1908?

The WITNESS: If any had come in by that time?

Mr. HILL: Yes.

A. Yes, sir; I think there was a little had come in.

Q. One carload, do you think? A. I couldn't say.

Q. But you do think that by March, 1908, only a little had come in there? A. Well, I couldn't say for sure.

Q. At the time your brother gave up the contract as you have testified, was there any stone in his yard that he could cut?

The WITNESS: Any stone in there that he could cut?

Mr. HILL: Yes, sir.

A. Plenty of it.

Q. Mr. Graham, in reference to those plug holes of which you have complained, in how many stones did you say you found them? A. I couldn't say exactly, but eight or ten.

Q. Were there ashlar or some other stones? A. Ashlar—not all ashlar; I cannot remember all that, I have been on 10

or 12 jobs since that; every job has different sizes; if you ask me something about the *Notre Dame* job, the job I am on now, I can tell you, but I couldn't tell you about the jobs that are past.

Q. Some stones, you say, were three or four times the right size; what did you do with the pieces that were taken off? A. They were laid around in the yard.

Q. You said that some of them were sold? A. Yes, some were put on the dump and sold.

Q. How much did they get for them? A. Oh, I don't know; sometimes you would get paid for them and sometimes (1052) you could not get anything; sometimes you have to give away if you get too many of them.

Q. On this photograph No. 8 there is a pile of stones shown. Will you look at those stone blocks and say whether any of those blocks are the proper kind of blocks which your brother should have received from the quarry? Tell the jury, if there are any blocks there that would be good?

The WITNESS: Net dimension, do you mean?

Mr. HILL: Yes.

A. There is not a one of them; they are not according to specifications.

Q. You say there is not one of them, that they are not net dimension blocks? A. Not a one of them; they are all rough.

GEORGE MANN, a witness of full age, having been duly sworn, testified as follows:

Q. (Mr. HARLEY) What is your occupation, if you please, sir? A. Cut stone contractor.

Q. How long have you been a cut stone contractor? A. Thirty-five years.

Q. Have you ever been in the quarry business? A. I have.

Q. For how long? A. For about ten years.

Q. Are you familiar with the usages of stonecutting and quarrying? A. I am.

Q. Mr. Mann, the specifications which I hold in my hand provide in section 32: "All dimensions of stones given in the (1053) drawings and schedules are the full net dimensions without allowance for thickness of joints." Now, section 5 of the specifications says: "Bidders for the Bethel granite work will therefore bid on the basis and understanding that the granite, in net dimension blocks, one block for each separate pattern, will be furnished to them without unnecessary delay and

without charge free on board cars at the quarry at Bethel, Vermont." Will you tell the gentlemen of the jury what is meant by net dimension blocks, if you please, sir? A. Just what it says, net is net.

Q. You say net dimension is net. Can you tell the gentlemen of the jury what dimension block means? A. Dimension blocks are dimension blocks; net dimension is net dimension.

Q. Well, net dimension means what?

The WITNESS: What was that?

Mr. HARLEY: Explain what you mean first by dimension block? A. Blocks quarried as close as possible to the size split in the quarry.

Q. What do you mean by net dimension blocks, tell this jury, please, sir? A. Why, it *mean* the net size of the stone.

Q. Have you had any experience in dealing in net dimension stones? A. I am buying net dimension stones almost continuously.

Q. What is meant by random stones, if you please, Mr. Mann? A. Random stone is large blocks of any size that stone dealers have on hand so as to cut up into small pieces as the occasion of the business may require.

Q. About how much ought a cubic foot of granite to weigh? A. I don't know; granite weighs various amounts; they usual-
(1054) ly run about 175 pounds to the cubic foot.

Q. Do you know the weight of Bethel granite? A. No, sir.

CROSS EXAMINATION.

Q. (Mr. HILL) Mr. Mann, do I understand that you are a quarryman? A. Not now.

Q. That you have been a quarryman? A. Yes, sir.

Q. What quarry did you work, sir? A. The Waltersville quarry, I was president of the Guilford and Waltersville quarry.

Q. Were you connected with any other quarries? A. Yes, sir; some other ones, marble quarries.

Q. But no other granite quarries? A. No, sir.

Q. Mr. Mann, did your granite quarry ship any granite on account of this National Museum job? A. No, sir.

Q. It did not? A. Not while I had connection with it.

Q. Can you tell me whether there is known in the granite trade any technical phrase or set of words as net dimension blocks? A. No, sir; I never heard of it before.

Q. What is your present occupation? A. Cut stone contractor.

Q. Cut stone contractor? A. Yes, sir.

Q. What sort of stone do you deal in mostly? A. Marble and Indiana limestone.

(1055) Q. Would you call that hard stone? A. Soft stone; there is one of my jobs over there (indicating).

Q. Over on the Courthouse? A. Yes, sir.

Q. How much did you do there, sir? A. About 50,000 cubic feet.

Q. Is marble as hard as granite? A. Yes, this Beaver Dam marble is.

Q. Do you know this Bethel granite? A. No, I have seen it but I don't know anything about the handling of it.

Q. Now, Mr. Graham, who has just testified, spoke about sawing. What sort of stones are usually sawed from the quarry? A. All stones.

Q. Is granite sawed from the quarry? A. Yes, sir.

Q. Is all granite sawed from the quarry? A. No, all quarries do not possess the facilities for doing the sawing.

Q. But at all quarries you could saw the granite? A. All the quarries I *never* knew of.

Q. Have you ever been in any New England quarries? A. Yes, the New England Granite quarry.

Q. You were there how long? A. Just for a day.

Q. Just for a day? A. Yes, sir; I did not work around there.

Q. Did you see them sawing any granite around there? A. No.

Q. Did you ever see them sawing any granite in any of (1056) the New England quarries? A. No, I don't know that I did.

Q. Have you ever been to any other New England quarries? A. Yes, sir; I have visited them; I have just gone and looked them over, for curiosity's sake, but I never worked in any of them.

Q. Did you see any sawing going on? A. No, sir.

Re-Direct Examination.

Q. (Mr. Harley) Is there any other way to quarry stone in net dimension block without sawing it, sir?

(Objected to.)

Mr. McLanahan: We object; he says there is nothing known as net dimension blocks in the trade. He said that is not a trade expression and it would mean nothing.

The Court: What is the question?

(The last question was then read by the stenographer.)

Mr. Harley: They cross examined him on that, sir.

Mr. McLANAHAN: But he said he never heard of that expression before and we object to the question if he does not know what it means.

Q. The COURT: You say you are not familiar with any such expression in the trade as net dimension blocks? A. Your Honor, I understood the question to be if I ever had known of that being specified. I never have known of it being specified, but I stated that I purchased stone and am doing it all the time to net dimension from the quarry.

(1057) The COURT: I think you can ask him if there is any other way of furnishing what he knows as net dimension blocks without sawing.

Q. (Mr. HARLEY) Can the quarry furnish net dimension blocks without sawing it, Mr. Mann? A. Yes, sir.

Q. How? A. They can channel it to a net dimension.

RE-CROSS EXAMINATION.

Q. (Mr. HILL) What sort of stone do you buy net dimension from the quarry? A. I buy marble and Indiana limestone.

Mr. HILL: That is all, thank you.

FRANCIS J. HAYDEN, a witness of full age, having been duly sworn, testified as follows:
(1058)

DIRECT EXAMINATION.

Q. (Mr. HARLEY) What is your occupation? A. I am a granite cutter when I am working at the business, but now I am representing the granite cutters on the work for the Union here in the city.

Q. How long have you been in the granite cutting business? A. Thirty-four years.

Q. Are you familiar with the usages of granite cutting? A. Yes, sir.

Q. Are you familiar with the terms in use in granite cutting work? A. Well, I never went over the drawings any except to go over the diagrams that came from the draughtsman to the cutter—

Q. Well, do you know what is meant by the terms "random dimension"? A. Yes, sir.

Q. Explain what that means. A. Random stones are stones brought to the yard and which lay in wait for orders; they are for no particular job but it is to be cut into small pieces for orders.

Q. Are you familiar with the term "dimension blocks?" A. Yes, sir.

Q. Explain what is meant by dimension blocks? A. It is a large block of stone—any block of stone that has the stone in it and is an inch or an inch and a half larger than the size wanted by the diagram.

Q. Are you familiar with the term net dimension blocks? A. Well,, of course, I have never looked over specifications but I have cut stone and worked on one of the largest department stores in the world, and the stone came to us in regular dimension sizes, and all we had to do was put our patterns to the (1059) size of it and put our molds in it and whenever it had to be bushed we just took our bush hammer and went over it and they went right in the building.

Q. What is meant by net dimension blocks? A. Well, it would not have necessarily to be sawed, but there should be a line chisled around it and pointed down to the line, which is the same as that marble hauled up to Hilgartner's or any of those places.

Q. What would the stonecutters have to do with those blocks? A. Take them right down to size. If it was a large block and he had to do any work with it he would have to set it in, and if he was cutting it by hand he would take and put the lines on it and there would be about a quarter of an inch of binding on it.

Q. How would the cost of cutting net dimension blocks compare with the cost of cutting dimension blocks, if you please? A. Well, stone that is quarried out right to the size will not take as long to do as those that have an inch or an inch and a half work on it, sure.

CROSS EXAMINATION.

Q. (Mr. HILL) You say you are a stonecutter? A. Yes, sir.

Q. For thirty-four years? A. Yes, sir; since 1876, last April.

Q. Were you ever associated with Mr. Graham? A. Yes, sir, I worked for him four or five or six years ago, probably.

Q. For Mr. Graham, the defendant in this case? A. Yes.

Q. Have you ever done any stone quarrying? A. No, sir. (1060) Q. You have had no experience as a stone quarryman? A. No, I never worked in a quarry. You do not have to work in a quarry to be a granite stonecutter. It is totally different—

Q. Totally different trades, are they not? A. Yes, sir; they are.

Q. Don't the stone cutters serve an entirely different apprenticeship? A. Yes, sir; wherever our International Association is, but I have seen men go right at it—

Q. How about in Scotland, how long do they have to serve there? A. I don't know, that, but I have seen thousands of men that came from Scotland who were good stonecutters not only in this city but in other cities where I have worked. I worked on this Museum job in Washington too.

Q. Who employed you? A. Mr. Pirie.

Q. What was your work there? A. Granite cutter.

Q. May I ask what wages you received? A. Well, the men working on the outside of the building got $3.60; nearly all the time I was there I got $4 a day.

Q. What were you doing? A. Working for the Government and on this job too.

Q. What were you doing? A. Granite cutter.

Q. Yes, but what were you doing to get $4? A. I was working in the building under Mr. Freas and outside under Mr. Graham.

Q. Was that important work that you were on? A. Yes, sir; soft stone work, under the dome.

(1061) Q. Was that Mr. Graham's work? A. No, sir.

Q. When you worked for Mr. Pirie on the Graham job you got $3.60? A. Yes, sir.

Q. And when you worked on the other job you got $4? A. Yes, sir.

Q. The Government paid you better wages— A. That was what I was entitled to.

Q. The Government paid you better wages than the other people? A. Yes, sir; the bill for the outside work in Washington previous to that contract coming over there was $4, but Mr. Green and Mr. Pirie asked the Washington branch to bring about an agreement between the organization and them and that they would probably cut the stone there instead of at Granite, Maryland, so that the Washington branch made it $3.60 and they brought the job there.

Q. That is because Mr. Green had the contract cut at Washington instead of at Granite, the Union gave him $3.60 instead of the $4 rate? A. Yes, sir; if he took it to Granite it would only be $3.25; you see, there is a double bill, for inside and outside work.

Q. When you speak of Granite, you mean Granite, Maryland? A. Yes, sir.

Q. Have you made any contracts in your own capacity for the cutting of granite? A. No, my organization does not allow me to make contracts unless I withdraw from the organization, and I would have to employ men to be a contractor.

Q. You have spoken of net dimension blocks? A. Yes, sir.

Q. If I am correct you said that with net dimension (1062) blocks you would allow an inch or an inch and a half? A. No, I didn't say anything of the kind; those net dimension blocks, as you call them, they came to the largest department building in the world, the John Wanamaker building in Philadelphia, and I worked on that from the starting to the finishing last fall, until I met with a little accident there; that is why I am here now; the stone come there sawed, and when not sawed they were lined right down; they come from High Island, off the coast of the State of Maine, cut in the ocean.

Q. Was that granite? A. Yes, sir; High Island granite.

Q. Who furnished that? A. I don't know, but the contractors were William Grey & Sons.

Q. Do you know if William Grey and Sons had control of the quarry? A. No, sir; I don't know about that; a fellow working around there don't get time to look after that; all you have to do is to keep your head down to business and when you are not doing that you want to be resting up.

Q. Did you ever come across, in any contract that you have seen, the term, net dimension blocks? A. I never see any contracts, bosses never show us any contracts; if we get a diagram for that Courthouse (indicating) they just say Job No. 10 or Job No. 15 and that is all they tell us; we don't know what it is; they do not let us know their business.

(1063) EDWARD R. BERRY, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) What is your occupation, if you please, sir? A. Cut stone business.

Q. That is the same kind of business as Mr. Frank F. Graham is in? A. Yes, sir.

Q. Have you ever been in the quarrying business? A. No, sir.

Q. How long have you been in the cut stone business? A. Twenty-five or twenty-seven years.

Q. Right here in Baltimore? A. Yes, sir.

Q. Are you familiar with the National Museum job? A. No, sir.

Q. Did you ever see any work on this Museum job? A. I was up in his yard to purchase some granite or some red stone that he had—

Q. Can you tell us the year? A. I suppose it has been a couple of years.

Q. What season of the year? A. In about the spring.

Q. Do you know whether it was before or after he stopped work? A. I was up there before he stopped and I was up there after he had stopped.

Q. Did you observe this Bethel granite in the yard there? A. Yes, sir.

Q. What was its condition?

(1064) The WITNESS: As to quantity or what, the condition of it, or what?

Q. (Mr. HARLEY) Well, you observed this stone in the yard? A. Yes, sir.

Q. You are not familiar with the drawings or patterns? A. No, sir.

Q. Could you tell from the stones that you saw in the yard whether it was dimension stone or not?

Mr. HILL: We object to that unless he defines what is dimension stone.

Q. (Mr. HARLEY) Tell us what is dimension stone? A. Dimension stone means that it is dimension in length, thickness and breadth.

Q. How close to the exact dimension, when you used the word or the term, "dimension," is the quarryman expected to cut? A. Well, he is supposed to cut as close to his lines all around as he can.

Q. What is the meaning, then, of the term, net dimension block?

The WITNESS: Net?

Mr. HARLEY: Yes, sir.

A. I would take that to mean right to the thing—sawed or pointed down ready for the hammer to go over it.

Q. How would the work on net dimension blocks compare with the work on dimension blocks? A. Well, there is quite a difference in the cost of cutting in dimension blocks over and above the cost of cutting on net dimension blocks.

Q. You saw this stone in this yard; can you say whether that was in net dimension blocks? A. No, sir; it was not.

Q. You would not call it net dimension? A. I would (1065) not call that net dimension blocks.

Q. Why wouldn't you? A. Mr. Graham put a rule on several pieces there and he—

Mr. MCLANAHAN: We object to that. The witness says that he did not notice the plans or patterns, so that this must

be hearsay information if he was informed that the patterns were too large.

The WITNESS: I am speaking of the dimensions he gave me and ruling it off with his rule.

Q. (Mr. HARLEY) Did he compare it with the drawings? A. *No* while I was there.

Q. (Mr. HARLEY) Can you say if the stone you saw there had been quarried.

The WITNESS: Quarried?

Mr. HARLEY: Yes, sir, had it been quarried?

Mr. MCLANAHAN: We object.

The COURT: I don't know what you mean by that?

Mr. HARLEY: How close, if your Honor please—

The COURT: Well, ask him first what he means by quarrying.

Q. (Mr. HARLEY) What do mean by stone being quarried?

The WITNESS: What do I mean by stone being quarried?

Mr. HARLEY: Yes, sir.

A. Why, when I order a stone to be quarried to dimension size I expect that stone to come in my yard pretty close to that dimension and I do not expect that stone to come on each side from a quarter of a ton to a half a ton of rough for me to plug off.

Q. Can you say from what you observed of the stone in the yard there that there were quantities to come off of that stone? A. Yes, from what was shown to me there were quan-
(1066) tities to be cut off or plugged off.

CROSS EXAMINATION.

Q. (Mr. HILL) Am I right in understanding that you have not done any quarrying at all? A. Yes, sir; only what little I have done around the yard when I wanted the men to cut down some work.

Q. And you call that quarrying? A. No, sir, I would call that scaddling off.

Q. Would you please tell the jury what you mean by quarrying in the sense that you used it there?

The WITNESS: In the yard?

Mr. HILL: Yes.

A. Suppose I wanted sills or platforms and I wanted to take one stone to make two and there were 8 inches rise, two foot breadth and I did not have two single stones there or one; I would hunt a stone there about 17½ or 18 inches and then I would put a line through there and split that stone through. Now, that stone may have a rough nose on the two opposite sides; if I could get a good split in there then I would save considerable time on using the—

Q. I want to know whether, in your experience of 25 years as a stone man you have ever seen any contract for supplying stone in which the words "net dimension blocks" were used? A. No, I cannot say that I have.

Q. Are you doing some work now for the new Fidelity building.

The WITNESS: For the new Fidelity building?

Mr. HILL: Yes, sir.

A. I have an order there for about 25 or 30 blocks for the Guildford and Waltersville Company.

Q. Is that granite? A. Yes, sir.

Q. How much will be the general cube of the order?

(1067) The WITNESS: Of the order?

Mr. HILL: Yes.

A. I don't know, I am generally on the street anyhow; Mr. Tracey has charge of that.

Q. Have you seen any of those blocks as they came from the yard? A. Yes, sir.

Q. Do you cut them there? A. Yes, sir.

Q. How much would you say those blocks would run over the actual dimensions, over the size of the stone when it is going to be cut? A. I suppose in the neighborhood of two or three or four inches.

Q. That is, those blocks are rough blocks with enough stone so that when you cut off two or three or four inches they will give you the smooth stone. A. Yes, the neat sized stone.

JOHN HOWARD HERRICK, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) What is your occupation, if you please, sir? A. I am a stone agent, wholesale stone.

Q. A kind of stone broker? A. Yes, sir.

Q. How long have you been in the stone business? A. Nineteen years.

Q. Are you familiar with the usages of the quarrying (1068) trade? A. I am.

Q. Are you familiar with the usages of the stone-cutting trade? A. To a certain extent.

Q. Do you know the meaning of the term, according to the usages of those trades, of random blocks of stone? A. Yes, sir.

Q. Tell the jury what that means. A. A random block is a block gotten out at the quarry without any specific size given to it; if a man ordered a random block from me I would know he wanted a good sized block which he could place in his yard so that he could cut a block out of it in the future.

Q. And what is meant by the term "dimension block?" A. It means the size *in* furnished us from which to supply the stone at such size.

Q. How near would that come to the actual dimensions *give* in the drawing? A. If a man ordered a dimension block I would think he was getting it at an average of 4 inches; if it ran over 6 inches he would have cause to complain, but if it came within 4 inches he would be getting what we call dimension blocks.

Q. How about net dimension blocks? A. Well, we rarely get an order for that; a quarry could not cut a net dimension block; they would have to do some hand or machine work on it; a net dimension block would be within half an inch of the size wanted.

Q. And that is something unusual? A. Yes, sir; it is very unusual for a stonecutter to order net dimension blocks.

CROSS EXAMINATION.

Q. (Mr. HILL) In your contracts for supplying stone (1069) have you ever known the phrase to be used "net dimension blocks"? A. I don't recall ever hearing the phrase used, net dimension blocks.

Mr. HARLEY: There is no doubt about it being used in these specifications.

Mr. HILL: No, sir; that is all right.

GEORGE M. KIRSTEN, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) What is your occupation, if you please? A. Granite cutter.

Q. Granite cutter? A. Yes, sir.

Q. Talk so all those gentlemen can hear you, if you please. How long have you been a granite cutter? A. About twelve years.

Q. For whom are you now working? A. The Baltimore Stone Cutting Company?

Q. That is Mr. Graham, Mr. Frank Graham? A. Yes, he is President of the company.

Q. Did you work on the National Museum job? A. I worked on it here in Baltimore.

Q. For Mr. Frank Graham I believe? A. Yes, sir.

Q. Stand up so those gentlemen can hear you and talk a little bit louder. You did not go to Washington, I believe, but worked on what particular? A. I worked one of the machines.

Q. Mr. Kirsten, what was the character of the blocks that were given you on that job for your machine for you to work? (1070) A. Well, they would come pretty rough sometimes.

Q. What do you mean by sometimes? A. Sometimes I would get what I thought was a good face and when I got it down I would find three or four big holes in it and it would have to be lined up again and we lost that much time and some had four to ten inches rough on them.

Q. What did you have to do then? A. Run my machine and run a channel through it and then take the bull set and pitch it off and then you take a chance and if you knock a hole in it you have to cut down another inch or two.

Q. How many of these stones were in that condition? A. I couldn't tell you exactly but pretty near every one.

Q. Did you notice the stone as it came in the yard? A. Yes, sir.

Q. What was its condition, can you say? A. The majority of it was pretty rough.

Q. Do you know what a dimension stone is? A. Yes, sir.

Q. What does that mean? A. It means a stone that comes in ordered by size and just give a man an inch or 2 inches to finish up on.

Q. Have you ever heard the term net dimension block? A. Yes, sir.

Q. What does that mean? A. It means perfect so that you do not have anything to take off, just about a quarter or a

half an inch. We call it trimming. I worked on a job in Milford where they sawed the stone and when they finished with the saw was bush them up; maybe there was one little corner out of line that would have to be cut down; that is net dimension.

Q. How would these stones that you had on this job compare with net dimensions? A. That would not be net dimen-
(1071) sion blocks.

Q. Why do you say so? A. Because some of it was rotten; some had a lot of shells in it; if I went down for one I might have cut another underneath it and some of it had to be lined up two or three times.

Q. Could you do that work on rotten stone, that is could you do it as well as on good stone? A. No, sir; but we had to doctor it up some way.

Q. How much time would it take? A. I couldn't say because I don't know how long it would take.

Q. Would it take a longer or shorter time than with good stone? A. Why, it would take a longer time, of course.

Q. What did you do with the rough work? A. I had to channel it down and take the bull set and pitch it off; of course when I go to work and channel the stone that is time lost right there.

Q. How much time would that take?

The WITNESS: How much time would it take?

Mr. HARLEY: Yes.

A. That all depends on how much rough there is on it.

CROSS EXAMINATION.

Q. (Mr. HILL) Now, you say you have heard of net dimension blocks? A. Yes, sir.

Q. When did you first hear of that term? A. In Quincy, Massachusetts; my uncles were in business there.

Q. And you have lived there? A. Yes, sir; I heard of it but I never quarried any of it.

Q. How did you hear of it? A. I heard it in the office.
(1072) Q. In what connection? A. In the office.

Q. In Quincy, Massachusetts? A. Yes, sir.

Q. As applied to what kind of stone.

The WITNESS: What do you mean?

Q. What kind of stone were they talking about? A. Granite.

Q. Quincy granite? A. Yes, sir.

Q. Did you work up there? A. Yes, sir.

Q. At what? A. Granite cutting.

Q. Granite cutter? A. Yes, sir; I worked there for my uncle, and I worked in the yard and in the office and all around.

Q. Did you work in the quarry? A. Yes, sir; I worked out in the quarry.

Q. What was your understanding of net dimension block? A. What we called net dimension block there, was when we got stone quarried—a man lined it up and it was taken to the polishing room and then it was called net dimension polished work.

Q. What was your output used for there? A. Monumental work.

Q. Did you finish the stone there, polish it at the yards? A. Sometimes we did and sometimes we did not; we sent it all over the country.

Q. When you sent stone away did you send it to some other *contract* to finish it up? A. Yes, sir.

Q. Then what did he have to do? A. Well, all we done (1073) was to put four sides to it and sometimes only one side.

Q. When you sent him the stone to finish up how much did you usually allow on dimensions? A. I don't know; we generally sent it down random and it was split in the yard.

Q. And how about as to other contractors, when they ordered it? A. That depends on how they ordered it.

Q. You said you sent net dimension stone down; how much was allowed on that? A. I could not say from the quarry.

Q. That was from the office? A. After the polishing mills got through with it.

Q. Then you never heard of any set dimension blocks sent out from the quarry? A. No, sir; not from the quarry.

Q. When you speak of ½ to ¼ of an inch what do you mean? A. It means in case it was ordered sawed or pointed down to net dimension block and then all I had to do would be to trim the edges off and bush it up maybe a ½ or ¾ of an inch.

Q. And you would call that a net dimension block which you would receive? A. Yes, sir.

Q. Whom did you get that from? A. Foreman.

Q. Where did he get it from? A. From the mill and the saw

Q. And where would the mill get it from? A. Out of the quarry.

Q. But before you got the net dimension block it would (1074)go through the mill? A. No, it did not have to go through the mill, they could point it down at the quarry.

Q. After got the net dimension block could you put the machine on it? A. Yes, sir, nowadays they do put the machine on.

Q. Could you put a machine on a stone with only $\frac{1}{8}$ of an inch allowance on it? A. Oh, yes.

Q. What kind of a machine is a bull set? A. A surface machine.

Q. Did you have any surface machines in Mr. Graham's yard? A. Yes, sir; that is the kind I was using.

Q. So you only used a surface machine? A. Yes.

Q. And you mean that when that came to you it should not have had more than $\frac{1}{8}$ of an inch rough on it? A. Yes, if you call it net dimension.

Q. You said that a good deal of the stone that came to Mr. Graham's yard was rough? A. Yes, sir.

Q. And a good deal was rotten? A. Yes, sir.

Q. How long were you working for Mr. Graham? A. For over five years.

Q. Are you working for him now? A. Yes, sir.

Q. How much do you receive a day? A. $4.10.

Q. When Mr. Graham was working for the Government the machine men get the same thing, did they? A. Yes, sir.

Q. How many machine men did he have? A. I believe 7. (1075) Q. 7 machine men? A. Yes, sir.

Q. How many car loads of stone were received from Bethel, have you any idea? A. No, sir, I do not know.

Q. Not at all? A. No, sir.

Q. When you say most of the stone was rotten and most was rough, how did you estimate that? A. Well, when I say that the stone was rotten it is full of shells; I cut down for one shell and after I have that out I git another one over here or over there (indicating) and then it would have to be doctored up.

Q. Did you say every stone received there was either rotten or rough? A. No, sir; not every one, but the majority.

Q. How many stones can you say that you know of yourself on this job were rotten or rough? A. Well, I could say five or six of them on my machine.

Q. Could you say more than 5 or 6? A. There might have been more or less.

Q. You testified that there were 5 or 6 stones there that were rotten or rough? A. Oh, rotten or rough.

Mr. HILL: Yes.

The WITNESS: More than that.

Q. How many? A. I couldn't say; nearly every one I had there I had to carve, was five or six inches rough on it.

Q. Were they the same during the first part of the con- (1076) tract as in the last part? A. Well, they were rough all the way through, but sometimes I worked on molding work, you know, and it was roughed pretty well before I got it.

Q. Was there any difference between the first and the last part of the stone? A. Oh, yes.

Q. How long did the contract last? A. I couldn't tell you.

Q. Were you there when the work was quit on this contract? A. Yes, sir.

Q. Why did they stop on it? A. I don't know I got paid at 12 o'clock and that is all I know.

Q. What did they say to you? A. Just told us to lay off; that was all the satisfaction I got.

Q. They did not say anything else? A. No, sir.

Q. Just told you to lay off? A. Yes, sir.

Q. Was there any stone there then in the yard? A. Yes, sir; the whole yard was piled up.

JOSHUA T. GALLAGER, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) What is your occupation, if you please, sir?

The WITNESS: Sir?

Q. What is your occupation now, if you please? A. (1077) Quarry business.

Q. How long have you been in the quarry business? A. Well, since I was 15 years old.

Q. Have you ever been in the stone cutting business? A. Yes, sir; I have cut stone.

Q. About how long, if you please? A. Well, I guess about one half of my life has been as a stone cutter, about 20 years, probably.

Q. Are you familiar with specifications, Mr. Gallagher? A. Well, I am not an expert on specifications.

Q. Not an expert on specifications. A. No, sir.

Q. I believe you just said you never heard of a net dimensions in specifications? A. No, I don't know as I ever saw it.

Q. Have you ever heard the term dimension blocks?

The WITNESS: Dimension blocks?

Mr. HARLEY: Yes.

Q. Tell the gentlemen of the jury what you mean by dimension blocks, if you please? A. Well, they usually send a list of stone to the quarry giving the sizes they want and the quarryman cuts them out to that size as near as possible.

Q. That is what is called a dimension block? A. Yes, sir; a dimension block of stone.

Q. As near as possible to the size wanted? A. Yes, sir.

Q. In the quarrying of stone, say they weighed altogether 60,000, pounds, that is net, that is after it was cut it would weigh 60,000 pounds—

The COURT: Pounds or cubes?

Mr. HARLEY: Pounds, I am trying to get the weight.

(1078) Q. What would be the fair average weight at which to quarry that 60,000 pounds? A. That would be a pretty good sized rock.

Mr. HARLEY: Yes.

A. Well, you could not quarry a rock that size from less than 2½ to 3 inches; you would have to allow that much on a stone of that size.

Q. But when it comes to weight how ought the quarry stone compare in point of weight with the stone after it is out.

The COURT: Do they ever compare them that way. You had better ask him that question.

Q. Do you ever compare them in point of weight, Mr. Gallagher? A. No, we never did that at the quarries where I worked; we loaded them on cars and they went at railroad weight.

Q. You cut them as near as possible and that ended it? A. Yes, sir.

Mrs. ESTELLE MCNEILL, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) You were formerly Miss Cole? A. Yes, sir.

Q. And formerly bookkeeper for Mr. Graham? A. Yes, sir.

Q. During this National Museum job? A. Yes, sir.

Q. And you married Mr. McNeill? A. Yes, sir.

Q. Who is he employed by—by the Government, I believe?

(1079) A. Yes, sir.

Mr. HILL: Is or was.

Q. Is he? A. He is not now.

Q. Was he employed by the Government on the National Museum job? A. Yes, sir.

Q. What time did you leave the employ of Mr. Graham? A. When they closed the work.

Q. In March, 1908? A. Yes, sir.

Q. And you were soon afterward married, I believe? A. About July 6.

Q. Did you go to Washington with Mr. McNeill? A. Yes, sir.

Q. And you have been here ever since the first day of this case on the subpœna of the Government? A. Yes, sir.

Q. And so far you have not testified? A. No, sir.

Q. Madam, I want to hand you this book and ask you whose figures they are, please? A. My figures.

Q. Will you state how you came to put them there? A. Well, Mr. Graham was claiming roughness on the stock and to make the thing plain my calculations throughout the work were based principally on the stone cutter's diagrams, that is the stock that is the exact *that is the exact* size of the stone. When Mr. Graham complained of the roughness of the stock, Mr. Graham got me to take the size on those; about 2 inches on the length and about 2 inches on the depth and I cubed up the stones as you see here.

(1080) Q. What is that (indicating)? A. That is the stone as it came in; it would be the actual size of the stone plus the 2 inches on the length and depth.

Q. 2 inches on length and depth? A. Yes, sir; these here are sizes on the same car—they were brought in to me from the yard and I know nothing about them except that I cubed them.

Q. This column marked "dimensions" are the dimensions plus 2 inches? A. Yes, sir.

Q. On three dimensions? A. On 2.

Q. And what is the rough? A. As the stone came in from the yard he would have his son or his brother—not often his brother—and sometimes the apprentice boy there would bring them in and they would vary at times.

Q. How was that? A. Sometimes a stone would be left off the car and I could not vouch for it whatever—

Q. I am not asking you to vouch for it. Please state how you put that down there? A. I put them down as they came in from the yard.

Q. By whom was it brought in? A. Sometimes Mr. Frank Graham, Jr., or the apprentice boy, his name was Heidle, or Mr. Graham's brother.

Q. What do you mean by this entry at the top here (indicating)? A. That was the stone—let's see, I have not seen those books for 2 years; that was a mark which Mr. Graham asked me to note on that stone.

(1081) Q. You have no knowledge of it at all, though? A. No, I have no knowledge of all this; it only came to me from the yard and I put it down.

Q. Did you put those down as they were given to you? A. Yes, sir.

Q. Were they put down correctly? A. Yes, sir.

Q. Were they checked up by Mr. Graham? A. Not to my knowledge, no, sir, sometimes he was away from the place entirely; I have seen times when that stone was brought in when there would be a stone missing and sometimes I would have to call for it; then sometimes one dimension would be missing and I would have to call for that and Mr. Graham would saw to just leave it go.

Q. Well, now, take this side marked rough stone; you made these entries from information furnished you? A. From a copy.

Q. From a memorandum handed you? A. Yes, sir.

Q. Didn't Mr. Frank Graham furnish the memorandum from which you made this first page entry? A. Indeed I couldn't tell you; it is too far back for me to remember.

Q. (Mr. HARLEY) Have you ever seen that diagram (indicating)? A. Yes.

Q. State who made that, if you please? A. I don't remember the making of it, but I would remember those figures (1082) as young Frank's; that is my work (indicating); the diagram and the figures giving the dimensions would be young Frank's. These are my figures, the date and the car.

Q. How about the diagram itself? A. I don't remember whether I made the diagram or whether *I* made it. I think Frank did, but I could vouch for the figures.

Q. Didn't you show that to Mr. Pirie? A. I don't remember; I may have done it, I don't know.

Q. Don't know, I am telling you the best I know.

Q. You have no recollection of showing that to Mr. Pirie? A. I have a recollection of Mr. Graham giving it to me and telling me to keep it because there was rough stock on it.

Q. Which Mr. Graham? A. Mr. Graham, Sr.

Q. And after he gave it to you you wrote— A. The number of the car and the date.

Q. This is yours? A. Yes, sir; and that (indicating) is young Frank's.

Q. Have you any knowledge of the stone? A. Only as Mr. Graham brought it in and said to put it in a place of safety and that he would show that it was stone that came in rough.

Q. Did you see this stone? A. No, very little; only an occasional sight from the window.

Q. You do not know whether that stone was rough or not? A. Only from hearsay.

Q. You had charge of the office? A. Yes.

Q. You and Mr. Pirie had the office? A. And young Frank was there most of the time and Mr. Abbie, the draftsman, was there, he was almost at elbows with me.

(1083) Q. He was the diagramist? A. Yes, sir; he came there in September.

Q. What time in September? A. I think it was labor day.

Q. Is that the gentleman that was recommended by Mr. Pirie? A. Yes, sir.

Q. He was recommended by Mr. Pirie to Mr. Graham? A. Yes, sir.

Q. And was gotten by Mr. Graham at the instance of Mr. Pirie, wasn't it? A. Mr. Pirie recommended him, I don't know much about that because it was between the two of them.

Q. You copied these letters in this book (indicating), did you?

The WITNESS: Which letters?

Mr. HARLEY: These here.

A. Yes, I copied them.

Q. How did you come to copy them? A. Well, I copied them from the copies which you have here in court the other day, the copies which you claimed were Mr. Pirie's copies.

Q. You copied them, from the original? A. From the lead pencil copies themselves.

Q. How did you come to copy them and put them in this book? A. At Mr. Graham's direction.

Q. At Mr. Graham's request? A. Yes, sir.

Q. When you wrote down under the rough here (indicating) you wrote down as nearly as you could exactly what was given to you? A. Yes, if I thought there was any error I call-

(1084) ed attention to it to try to get it as correct as I could.

Q. This is just as it was given to you? A. Yes, sir.

Q. Who gave you these figures, now, Mr. Graham gave you some? A. Comparatively he may have given me some, but it was a precious few. More generally it was young Frank or this apprententice Heidle; I think the majority would come from young Frank.

Q. How does that apprentice spell his name? A. H-e-i-d-l e, but the majority would come from young Frank.

Cross Examination.

Q. (Mr. Hill) Mrs. McNeill, in what form or what shape were the figures given to you which you have spoken of as having put down in the book there? A. Well, it was just the letter and the three dimensions of the stone, you know, and it was left for me to cube.

Q. Were they given to you verbally? A. No.

Q. On slips of paper? A. Yes.

Q. Have you those slips of paper? A. No, sir; I tore them up as I copied them, you know; at least, I guess they are torn up by this time; I know where they are.

Q. Now, those slips of paper had the dimensions of the stones on them? A. Three dimensions.

Q. Those are the dimensions taken from the setting plans? A. No, sir; those were the rough dimensions, it is just as they came in, it was while Mr. Graham was claiming they were rough and he took that as a proof to show it, and I was to copy (1085) that and then take the actual size and add two inches to show the difference.

Q. Did they take the measurements from corner to corner? A. I don't know.

Q. How did they take the measurements? A. With the rule, the length, breadth and depth of the stone.

Q. Suppose the stone had a hump on the top, you don't know anything about that at all? A. No, sir.

Q. Do you know if the dimensions were correct? A. I could not tell; if Heidle took the stone and young Frank took the stone there would be a difference.

Q. A difference in the same stone? A. Yes, sir; and there are times when a stone was left off altogether and I would have to call for it and sometimes a dimension would be left off and sometimes in order to fill up the car Mr. Graham would just tell me to take these extra 2 inches to cube it to fill up the car.

Q. Do you know why Mr. Pirie recommended or suggested Mr. Abbie as a draftsman? A. That would be quite a little story. Mr. Pirie came to the yard in February and then we had no draftsman; young Frank was a boy who went to school

and I had no knowledge and I was left to draw some of the diagrams for the plain ashlar, though I had no knowledge of the work, and I remember Mr. Pirie taking some diagrams to Washington to his son, and we were kept busy running from our office to the architect on Baltimore street, and before we could let the diagrams go in the yard Mr. Pirie would have to approve them and I remember he recommended Mr. Abbie and it was near Labor Day before he came.

(1086) Q. What year was that? A. 1907?

Q. After he came what did he do? A. He attended to the getting out of the cutters' diagrams and the patterns.

Q. And who had done that prior to that time? A. I don't know that there was much pattern work gotten out at all.

Q. What is the pattern work? A. They take the full-sized details and made a cut of the stone so that the stone-cutter can take that pattern and lay it on his stone and mark it off and cut it.

Q. And who did that before Mr. Abbie came? A. I don't know; I don't think there was much of that done; Mr. Pirie, I think, did some, and young Frank and I think Mr. Walter Graham.

Q. Were they doing any stone cutting in the yard then?

The WITNESS: When do you mean?

Mr. HILL: Before September first, 1907?

A. Yes.

Q. Will you please look at this letter and statement and enclosure and state what they are?

Mr. HARLEY: That is not cross examination. We have no special objection to the witness testifying but we think she should have been called in chief.

The COURT: I will allow it.

A. I don't remember how many cars there were; this is from our first shipment of cars. It is a bill on which Mr. Graham claims an amount of money due to roughing out these rough stones.

Q. And who made that up? A. I did.

Q. At whose direction? A. Mr. Graham's.

(1087) Q. Did he see it before you sent it forward? A. I think he did—certainly he saw.

(Examination concluded.)

FRANK F. GRAHAM, JR., a witness of full age having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. HARLEY:

Q. Frank how old are you? A. Almost 21.

Q. Almost 21? A. Yes.

Q. Where were you in 1907 and 1908? A. Down to the stone yard at the foot of Calhoun street and the B. & O. Railroad.

Q. Your father's stone yard? A. Yes.

Q. Do you know who took the measurement of the incoming rough stone? A. Yes.

Q. Yes.

Q. Who did take it? A. My uncle Walter was the Superintendent and he took the measurements. Only, when he was busy then I took them. If I didn't happen to be there and my Uncle Walter was too busy, an apprentice boy by the name of John Heylet took them.

Q. After your Uncle Walter took them, what did you do with them? A. I brought them into the office but when my Uncle Walter took them he brought them over to the office to Miss Cole.

Q. Then what happened? A. She entered them in the book.

Q. Who called them off to her? A. In some cases I called
(1088) ed them off to her but I did not do that in all.

Q. You did not in all cases? A. Yes, I did in some but when I took them myself, I called them off in all cases.

Q. Did you call them off correctly? A. Yes.

Q. Do you know whether they were put down correctly? A. She checked them back to me.

Q. She checked them back to you? A. Yes.

Q. Can you say whether or not you called that one (indicating) off to her. Can you look at this (indicating) and say whether that is one that you called off to her? A. No, sir, I won't say that.

Q. You cannot say as to any specific one? A. No, sir.

Q. But those you called off were called off correctly? A. Yes.

Q. And she called them back to you? A. Yes, but I could not say which one. I took one or the other.

(No cross examination.)

(Examination of witness concluded.)

WILLIAM E. DIBBELL, a witness of full age having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. HARLEY:

Q. What is your occupation, please sir? A. I am in the granite business.

Q. What department of it, if you please? A. I am General Manager of two Companies who are quarrying out granite.

Q. How long have you been in the granite business? A. 23 years, August 18th next.

(1089) Q. Are you conversant with the usages of quarrying and stone cutting? A. Well, I think I am.

Q. What, in the usages of the quarrying and cutting trades, is meant by dimension block, if you please, Mr. Dibbell? A. It means that we receive from a customer a list of sizes and we quarry these blocks as nearly to those sizes as possible.

Q. Now, illustrate that: What do you mean by nearly as possible? A. Well, within an inch, or possibly 1½". I should say 1½" on the average.

Q. That is for dimension block? A. Yes.

Q. What is meant in the trade by random blocks of stone, Mr. Dibbell? A. Stone of any size that you chose to ship—it doesn't matter what the size is. You place the measurement on it and the customer pays accordingly.

Q. What is meant by net dimension block? A. Well, I do not see that it can mean anything except stone to the exact size.

Q. What is the weight per actual cubic foot of granite, if you please, Mr. Dibbell? A. Well, the weight of the granite per cubic foot varies slightly. I can only testify as to our own material, and that is 166⅔ lbs. the cubic foot.

Q. Mr. Dibbell, in furnishing dimension blocks in large quantities, say upon a job of about 60,000 cubic feet, what excess of stone would be reasonable over and above the actual dimension? A. I think I have already stated that an inch, and possibly 1½".

(1090) Q. How would that go in weight, do you know, sir? A. Yes, it would run from—you mean the cubing by the dimensions that way given in the order?

Q. Yes? A. It would run from 200 to 210 lbs.

Q. That is for dimension blocks? A. Yes.

Q. Are you familiar with Bethel granite? A. With what?

Q. Bethel granite, if you please, sir? A. I am not.

Q. Is there any difference as far as the meaning of the terms are concerned as to different quarries? Do the terms mean the same thing the world over? A. The same is all quarries.

CROSS EXAMINATION.

By Mr. HILL:

Q. Did you ever see or hear in any contract for furnishing stone, from your quarry or from any other quarry before this case, the use of the term "net dimension block"? A. Net?

Q. Net dimension block? A. From our quarry are you asking me?

Q. Yes? A. No.

Q. Have you ever come across that in any other contracts for furnishing stone from the quarry? A. In granite?

Q. Yes? A. No.

Q. Have you run across it in anything else, any other stone, marble or anything else? A. I have seen it used in other stones.

(1091) Q. What stones? A. Specifically, I cannot answer you, but it is a term I know that has been used and probably is used in other stone. It may be applied to granite if they choose to do it.

Q. Am I right in understanding you in defining that to say that it means nothing except stone of the exact size? A. That is my interpretation of it, yes, sir.

Q. Mr. Dibbell, are you furnishing at the present time any blocks of stone to the Fidelity Building, for use on the Fidelity Building?

Q. We are doing that contract.

Q. That is granite, sir, is it? A. That is granite.

Q. The blocks that you are furnishing, what would you call them? I mean, would you call them rand*u*m blocks, dimension blocks, or net dimension blocks? A. We are not furnishing blocks. We are cutting it and setting it in the building.

Q. Do you quarry the stone? A. We quarry the stone and cut it and set it for the Charles Street entrance; for the Lexington street side we quarry it and send it to Mr. Graham.

Q. And he cuts it? A. Yes.

Q. What would you term the blocks that you sent to Mr. Graham? A. Dimension.

Q. How close would they run? A. If they didn't run within an inch or 1½" we would make good the difference.

Q. You do have to make good the difference? A. Yes, and have *you have* done it many times.

The COURT: How do you make it good? A. By check at the end of the month, or make an allowance on his bill, and the check is sent to him direct. We have done that in dozens (1092) and dozens of cases.

Q. It means the same either way? A. Yes.

Q. You make the allowance to him? A. We make the allowance, your Honor, by taking off that amount from his bill, or by shipping him other stone to the value of it, or by check.

Q. How do you arrive at it? A. We examine it. If our stone is over size he calls us up on the 'phone and one of my clerks, or myself, examine it and confirm his statements, and on finding him correct, we agree upon the allowance.

Q. That is a matter of agreement between you? A. Yes.

Q. And that is based upon the extra work in cutting it? A. Partially so; that is the largest item but there is also the freight incurred for the extra weight on the stone, and the fact that he was expected to receive within a certain limit the exact size.

Q. The allowance is based on some pecuniary compensation, extra freight is one, and another is the extra cutting? A. The cost of bringing that down to meet the lines which he should have received when we shipped the stone according to agreement.

Q. Those two elements constitute the standard— A. Those two elements, yes, sir.

Q. (Mr. HILL) What would be the dimensions of the largest stone furnished Mr. Graham for cutting under that contract up there? A. I do not understand your question? Are you asking me what would be the largest stone we would ship?

Q. What is the largest stone you would ship Mr. Graham, called for by that contract, which he was to cut? A. Do you (1093) mean how large a stone we could ship Mr. Graham?

Q. How large a stone does your contract call for that he would have to cut? A. You mean the Fidelity contract?

Q. Yes? A. I beg your pardon, I did not understand you. 70 or 72 cubic feet in this particular case.

Q. Now, would that mean in the finished stone, would that mean the cubic feet in the finished stone? A. Yes.

Q. And about how much allowance for cutting would you put on that? A. That is a matter of figuring it out. I have told you 1″ to 1½″ is the quarryman's rule as to excess rough on the granite to find the size.

Q. Have you made him any allowance so far? A. Yes.

Q. For extra rough stone? A. Yes.

Q. And you made it to him on what excess of roughness? A. That is a matter of agreement. Over an inch or 1½″ we

agreed upon the excess freight, as I have already told the judge, and we may agree upon the excess cost we put him to in cutting it. They are individual—what shall I say—arrangements.

Q. Does your contract with Mr. Graham specify an inch or 1½"? A. No, sir.

Q. What does it say he shall get? A. It says dimension stone.

Q. And the matter of 1" or 1½" is merely just a matter of agreement between you? A. That is the custom of the trade, universal.

(1094) Q. Universal custom of the trade? A. It has been 23 years.

Q. Does it ever vary in granite? A. Vary?

Q. Yes? A. You mean 1" or 1½"?

Q. That is, are there any circumstances under which more than 1" or 1½" would be proper? A. I do not think there are any circumstances under which more than 1" or 1½" of rough wouldn't call for the customer demanding a rebate.

Q. For the customer? A. Certainly.

Q. Suppose you have a contract for someone to cut stone furnished from a quarry, would there ever be any quarry that you know of in which a proper allowance on that stone would be more than 1½"? A. I do not think I quite catch your idea.

(Question repeated to the witness.)

A. I do not think any quarry would refuse to allow the customer a rebate for any excess over 1" and ½".

Q. Would it make any difference in the rebate whether the stone was to be cut on one side or on more sides than one? A. No.

Q. That is, your allowance on your rough stock would be identically the same if the stone were cut on one side or cut on six sides? A. If the quarry received the list of sizes he is supposed to quarry it on the three dimensions to those sizes with not more than 1" and ½ rough.

Q. Suppose you were asked to cut on six sides, would (1095) that make any difference in the allowance? A. My last answer covers your question.

(Last question and answer of the witness read.)

Q. What I asked you was, suppose that your stone is to be cut on six sides, full and fine, would there be any difference in the allowance in that than if it were only cut on three faces? A. No.

Q. None at all? A. Not under your contract.

Q. Under what contract do you mean? A. The average contract of the man who orders dimension stone.

Q. And the contract simply says dimension stone? A. Yes, and gives you the list of the sizes.

Q. Did you furnish any dimension stone to Mr. Evans for the Custom House? A. Yes.

Q. Was it rough? A. Yes.

Q. Did you consider it excessively rough? A. Some of it was very rough.

Q. Did you allow any rebate for that? A. We reduced the price before we got through five cents per cubic foot and we had 50,000 cubic feet to furnish.

Q. On how many cubic feet was the claim made? A. I could not tell you without referring to the books.

Q. Have you ever been to any of the New England granite quarries? A. Only there near my home and that is years ago.

Q. Have you ever been to the Bethel quarry? A. No, sir.

Q. Would you think, as a stone man, that the allowance would run differently in different quarries? A. It should not.

(1096) Q. From the way the quarry lies? A. It should not.

Q. On this job at the Fidelity Building have you allowed every complaint that Mr. Graham made for excess? A. There are only a few complaints that have been brought into question. He is waiting on us to receive orders to haul the stone to the building.

Q. Well, that doesn't answer my question.

(Question repeated to the witness.)

A. I will change my answer as I did not get it exactly right, to yes.

Q. Then you have to settle with Mr. Graham for every one of the claims he has made? A. Mr. Graham has only made one complaint?

Q. He has only made one complaint? A. Yes, and we have agreed to settle that in our usual way.

Q. How much excess did he claim on that? A. I do not think he has stated the amount of excess.

Q. Then, you have agreed to settle with him in your usual way before he has stated what the excess is? A. Whenever there is an opportunity to check it up at his yard with him that will be found out.

Q. Didn't you state a while ago that you had settled with him? A. Not intentionally, I did not, at least not in this particular case.

Q. Am I right in saying that you have made no settlement with Mr. Graham on rough stone? A. In this particular case, that is right. We have agreed to settle with him in the usual way.

Q. On what basis? A. The usual basis.

(1097) Q. How much rough excess does he claim? A. He hasn't presented the case yet for lack of time to check up with me at his yard. We have agreed to settle to his satisfaction when we can check it up.

Q. Then, according to the custom of your quarry, you always agree to settle to the satisfaction of the customer, the satisfaction of the person you sold that to? A. I do not say that.

Q. Tell me what basis you are going to settle on if you have not checked it up? A. We haven't had the opportunity to check it up on this particular job.

Q. Do you still say that you settled with Mr. Graham for it? A. I say we agreed.

Q. On what basis have you agreed to settle it with him. What does he claim is the excess; how much excess does he claim? A. The claims shall reach a settlement when we have a chance to check up the stone.

Q. Let me ask you this again because I haven't made my question clear, apparently. You say that you think anything over 1″ and ½ is too much? A. I do.

Q. Now, then, on what does that mean, and 1″ and ½ on each dimension? A. Yes, on each of the three dimensions.

Q. Now, Mr. Graham, has made a claim against you for excessively rough stock and how much does he claim over what you have given? A. He hasn't made a definite claim as yet. He has told me that he will have to present a claim for excess rough on his stock and I have agreed to allow him the usual

(1098) rebate.

Q. And how will he prove that claim? A. By my personal interview when you let him have a chance to measure it with him.

Q. How will you measure the stone? A. By putting a square and line on it.

Q. Suppose you find the stone in one point jutting out 2″, would you allow a ½″ over the dimension of the stone A. To be exact, we would. That is drawing the line pretty fine.

Q. I want to know exactly how you do that: Suppose Mr. Graham comes to you and says, Here is a stone 3″ over the dimension, you look at that stone and you find on one end one piece just out 3″. How would you settle with him on that? A. If there was a projection of 3″ on one part of the stone, not exceeding perhaps two or three inches in average,

and the rest was correct as to our measure dimensions, he would probably raise no question.

Q. Suppose he did raise a question. You said if he raised a question you went and examined it with him and that you measured it over all? A. You have asked me if there was place on one stone, one point, where 3" high, would we make an allowance over the 1" and ½"? How long do you want that to be?

Q. Take a stone 2-feet high by 4-feet wide by 8-feet long—in the first place, will you tell me what the cube of that stone would be? A. Multiply the three together. You can do it.

Q. Suppose you do it on this paper? A. I can do it, yes. What are the sizes?

(Question read by the stenographer.)

Q. Will you please do it? A. 64.

(1099) Q. What is that? A. 64. You can have your piece of paper as I do not need it.

Q. How much allowance would you made on that as a proper allowance for rough stone? A. You haven't told me how long that projection was to go.

Q. I gave you a stone 2 x 4 x 8. Now, you said the cube of that stone is 64 and I ask you how much the proper allowance would be on that stone, what you would consider the proper cube allowance on that stone without allowing any extra?

The Court: What would be the excess?

Mr. Hill: I want to ask him first, sir, what the rough allowance would be on that, just the rough general allowance.

The Court: How much does it amount to?

Mr. Hill: I want him to tell me whether in that size stone he thinks 1" and ½" would be proper?

The Witness: You did not put it that way.

Mr. Hill: I will have the question read to you.

(Question read.)

The Court: Would 1" and ½" be a customary allowance on that stone?

The Witness: Yes.

Q. (Mr. Hill) Now, suppose the quarry lies that way (indicating) and suppose the grain is up and down, and suppose the riff lies as usual, which I understand is usually horizontal, would there be any difference in allowance in such a quarry on a stone 2 x 4 x 8 from a stone taken from a quarry in which the stone lays perfectly flat? A. Well, if I ordered a pair of shoes No. 8, I should not expect a pair of shoes No. 9.

Q. I submit that that is not an answer.

(1100) The Witness: Your Honor, if I have an order for a piece of stone, of a certain size, the custom has nothing to do with the lay of the quarry. I have to furnish it as that is my contract, and according to my contract. I consider the question absurd.

Q. You consider it absurd? A. Yes.

The Court: He said that a man who orders stone expects to get it the dimensions he orders it without any reference to the way in which the quarry lies.

Mr. Hill: I have asked him what the proper allowance on a stone of 2 x 4 x 8 would be and he has said 1″ and ½″. I have asked him whether he would make any change in his answer if there were different conditions in the quarry. Assuming that stone layed flat in the quarry, or had to be taken out on an angle of 45 degrees, would that make any difference in the allowance?

The Court: Can you answer that question?

Mr. Hill: I have asked him whether there would be any difference on the allowance and he answered my question by some totally irrelevant talk of a pair of shoes. I asked that the question be asked and if he is not capable of answering it, he can say so, and if it isn't clear to him I will put it again.

(Question repeated to the witness by the stenographer.)

The Witness: We have an order for a piece of stone of a certain size, the quarry would have to furnish that stone according to dimensions with no excess of more than 1″ and ½″ on any of those three dimensions.

Mr. Hill I ask that the witness be required to answer the question. I asked whether there would be any difference in the allowance if the nature of the quarry was different.

The WITNESS: What I wish to express in my answer is
(1101) that no matter what the quarry is, our contract is fixed and none of the three dimensions in any quarry can exceed an inch or 1″ and ½″.

Q. It makes no difference about the quarry? A. No.

Q. Suppose your contract said that local conditions would be taken into consideration, would that make any difference? A. What is that?

Q. Would local conditions have any effect on it if your contract so stated? A. I should say it would.

Q. Let me ask you this: Is there any difference in the way that quarry split out—or does the *qay* a quarry lies make any difference in the splitting out of the stone in reference to the ease or difficulty in splitting it out? A. My personal experience is confined to three quarries and they happen to be similar. I do not think that I am the man to answer that question.

Q. Suppose I should say to you that the Bethel quarry, which is in question here, lies at about an angle of 45-degrees, and then, suppose I asked you whether in taking out the blocks, in your opinion as a quarryman, for the stone, it would be proper to allow more than 1″ and ½″, and what would your answer be, please? A. I do not think I am called upon to answer you for this reason: I have told you that I had no experience except in quarries which were similar to each other and therefore I would have to give you a guess on that. If I had the experience I would be glad to answer you.

Q. All the quarries in which you have had experience were quarries in which the stone lay flat, were they not? A. Very
(1102) nearly; not exactly.

Q. Mr. Dibbell, the 21st article of the general instructions and conditions of the contract in question before the court and jury says; "It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders or their authorized agents, are expected to examine the samples and drawings referred to in the specifications, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies." In your experience with the three quarries that you have been associated with, do you find that weather *condition* make any difference in the rough blocks that are taken out? A. You mean as to their splitting?

Q. Yes? A. At times.

Q. Would they make any difference in what you would consider a fair allowance to a rough block to the man who was to cut it afterwards? Is that question clear? A. It is.

Q. Then kindly answer it? A. There are conditions of weather under which stone doesn't split as well as others, which occur seldom in this climate.

Q. Suppose you have a condition in which the stone doesn't split as well as usual, would you have to allow more on your general dimension size in order to get your proper block when it was finished, or would you have to allow less? A. In laying the lines?

(1103) Q. Yes? A. In our quarries it doesn't make any difference. That is not the trouble. Do you wish to know the reason?

Q. Yes? A. If a stone is partly frozen through, no matter where you lay your line it is apt to start in straight and dodge in another direction. Perhaps in very well frozen, thin stone, it is apt to go straight, but the fixing of the lines in our quarries has no bearing upon the direction of the split in cold weather. I am, of course, speaking of quarries I know of.

Q. And which quarries are those? A. The Woodstock quarry in Baltimore and the Petersburg quarries in Virginia. There are two of them.

Q. Those are pretty large quarries, both of them are they not? A. They are.

Q. And in both of those quarries, the stone lies level, does it not? A. Fairly so.

Q. And you have had no experience in the New England quarries? A. I have not.

(Examination of witness concluded.)

GEORGE A. HAMILTON, a witness of full age having been duly sworn testified as follows:

DIRECT EXAMINATION.

By Mr. HARLEY:

Q. What is your occupation, please sir? A. Stone cutter.

Q. Stone cutter? A. Yes.

Q. You are now working for Mr. Frank F. Graham, I (1104) believe? A. Yes.

Q. Did you work at the National Museum job? A. Yes.

Q. In Baltimore, under Mr. Graham? A. Yes.

Q. And also in Washington? A. Yes.

Q. Under the Government? A. Yes.

Q. What kind of work did you do here in Baltimore? A. Cut the stone.

Q. By hand or by machine? A. Well, hand and machine both.

Q. How long were you engaged on the job here in Baltimore? A. I do not know but I suppose about eight or ten months, I guess, but maybe longer.

Q. Were you on the job when Mr. Graham stopped working on it? A. Yes.

Q. And that was in March, 1908? A. Yes.

Q. Now, did you have occasion to observe the kind and character of the stone as it came in the yard? A. Do what?

Q. Did you have an opportunity to observe the kind and character of the stone as it came in the yard from the quarry? A. Yes.

Q. What kind of stone was it?

Mr. McLanahan: If your Honor please, how can he ask him about the dimension of that stone until this witness testifies that he knows what the dimensions are and can say that he saw the drawings and knew what the dimension should (1105) be?

Q. (Mr. Harley) You had the diagrams to work, from, didn't you? A. Yes.

Q. Were you familiar with the diagrams? A. Yes.

Mr. McLanahan: If your Honor please, we would like this line of inquiry limited to the stone that this witness himself worked on.

Mr. Harley: What was the character of the stone that you worked on, Mr. Hamilton?

A. Well, some of it was pretty rotten; some of it wasn't fit to cut.

Q. What do you mean when you say it wasn't fit to cut? A. Well, is wasn't fit to go in a building.

Q. Why? A. Because it wouldn't hold the edge and corners.

Q. You mean it was rotten? A. Yes.

Q. Explain what you mean by that.

The Court: If he knows what rotten means?

The Witness: We call it rotten when it won't hold an edge or corners, and when you try to put on a corner it falls off.

Q. (The Court) Crumbles off? A. Yes.

Mr. HARLEY: That is the word, it crumbles when you try to work it.

A. Yes.

Q. Is it harder or easier to work than good dimension stone A. It is harder. It is harder to get the edges and corners on.

Q. Do you know what dimension blocks are? A. I do not (1106) know how to answer that as I do not know what you mean.

Q. Do you know what— A. What they ought to be quarried at?

Q. Yes? A. I do not know, I know what is a dimension block.

Q. What is it? A. Well, it is supposed to be quarried according to the size.

Q. How close to the size? A. Well, 1″ and ½″ or 2″.

Q. About 1″ and ½″ or ″? A. Yes.

Q. What can you say about these stones that came there to Mr. Graham's yard. Were they quarried within 1″ and ½″ or 2″ of the size?

Mr. MCLANAHAN: Only the ones that he personally knew of in the diagram.

Mr. HARLEY: Just those you know about?

A. No, they weren't quarried that neat.

Q. How were they quarried? A. The ones that I worked on, some of them was rough and you had to bull set.

Q. What do you mean by that? A. It was a bull set— we used to take a big hammer and knock it off.

Q. If it wasn't quarried the proper dimensions you would have to do that? A. Yes.

Q. But if it had been quarried the proper dimension would you have to use the bull set? A. No, sir.

Q. Did you observe the stone generally which came into the yard? A. Why, I looked at a good bit of it, yes.

(1107) Q. How was that? A. It was pretty rough.

Mr. HILL: I object to that on the same ground as the other questions. He must testify to whether he knows what the dimensions of the stone should have been?

The COURT: Do not answer unless you know what the dimensions should have been, and what they were.

Mr. HARLEY: Did you see any drilling around the Graham yard? A. Yes.

Q. Up to what time? A. Do you mean up to the time he was finished?

Q. You mean it continued up to the time that Mr. Graham stopped? A. Yes.

Q. What was that drilling for? A. It was to drill off the sizes to the neattee, and some of it was plugged the rough off.

Q. Does that have to be done with dimension blocks? A. No, sir.

Q. What is your answer? A. No, sir.

Mr. Hill: I object to that, your Honor, because the witness hasn't testified that he knew what dimension blocks are.

The Court: I think he has; I think he said dimension blocks ought to be 1" and ½" or 2".

Q. (Mr. Harley) Mr. Hamilton, how many inches have you seen them drill, or slab off of stones there at the yard on that job? A. Well, about 10 or 12".

Cross Examination.

By Mr. Hill:

(1108) Q. You have testified you saw them slab off 10 or 12" on a block? A. Yes.

Q. Just what block was that? A. A cap.

Q. What kind of cap, sir? A. It is a cap. In all this stone work on the job there were things known as caps. Those gentlemen know what caps I mean.

Q. Which caps? A. The cap that goes on top of the column.

Q. Would you recognize it if you saw it on the setting plan? A. When it is in the building?

Q. No, before it goes in the building? A. After it was finished?

Q. No, before it was finished.

The Court: Do you know which kind of cap it was?

Mr. Hill: There were two kinds of caps. Pilaster caps and column caps, and now I ask you do you know whether it is column cap or a pilaster cap? A. Column cap.

Q. Column cap? A. Yes.

Q. Now, when you say that you saw them slab off 10 or 12", does that mean from one point or from a whole side, or

what? A. I do not know whether it was a whole side or not; I know it was one corner.

Q. One corner? A. Yes.

(1109) Q. Was that in the process of roughing it out that you did that on a column cap? A. They roughed it out as before that they had to do that, they had to do that before they roughed it out.

Q. Was that 10″ in the roughing out, or was that before they started what you considered the roughing out? Was the 10″ taken out before they started to rough it out or afterwards? A. Before, they had to rough it out afterwards.

Q. Was this in the top or bottom bed? A. Top bed.

Q. If I showed you those column caps, do you suppose you could identify which one of those it was? A. No, sir.

Q. You couldn't do that? A. No, sir.

Q. Could you draw a picture of that stone to show exactly what part they had to knock that 10 or 12″ off of? A. No, sir.

Q. I mean just show us what the rough size of the stone was—you did it yourself, did you not? A. No, sir.

Q. Who did it? A. Those men working on the outside; I seen it done.

Q. You saw them do it? A. Yes.

Q. How do you know it was 10 or 12″? A. I judged it was about that.

Q. How did you judge it? A. Well, when I look at a thing I can judge.

Q. How does it happen that only that particular thing made such an impression on your memory, that you remembered it at this time? A. Because I saw them working on it.

(1110) Q. If you saw them working at it certainly you can draw a little sketch of the stone and show just what part it was they knocked off, the joint or the end or what, or was it the knocking off of the piece of the side? 10 or 12″ is a pretty good projection. What I am asking you is was it on the end or side of the stone, or was it a skewed off-piece on the corner of the stone that they knocked off? A. All these is sides (indicating). The face I would call the side and, well, it was on the side.

Q. How large a piece in width would it be that was knocked off? Now, do you remember the general shape of that stone? A. Yes, sir.

Q. Please sketch it out, will you? A. Something like this (indicating—I think. All the way around like that (indicating—on all four sides.

Q. Is that the top or bottom? A. Top.

Q. Is that before it was roughed out or afterwards? A. That is afterwards, it was roughed out.

Q. Draw it all the way around? A. It is something like that before it was roughed out.

Q. And out of that was cut like this (indicating)? A. It was cut out like that (indicating).

Q. Like this (indicating)? A. Yes.

Q. Where was this piece knocked off, the top or bottom? A. The top.

Q. Suppose I showed you a sketch here, a sketch which shows a square with pieces cut out from the squares, that is scalloped out, would that be the shape of the top of it when it was roughed out (indicating)? A. I forget whether this (indicating) was in here or not. I think there was a little bump in here like that (indicating).

(1111) Q. Where was that piece knocked out from? A. It come off the side.

Q. Now, do you know what the shape of the bottom of that stone was? A. After it was finished?

Q. Round or square? A. I do not remember.

Q. You do not remember? A. No, sir.

Q. Now, Mr. Hamilton, how many stone did you come into personal relation with, you might say, during the contract, how many stones did you cut? A. Did I cut?

Q. Yes, in Mr. Graham's yard? A. I could not answer that question, but it was a good many.

Q. Do you suppose one every day? A. One every day?

Q. Yes? A. No, sir.

Q. Did you cut 100 stones? A. I do not think I did.

Q. Did you work on 50 stones? A. Probably I did; I won't be sure.

Q. Let us assume that you worked on 50 stones? A. I ain't positive about that, you know.

Q. Just as a matter of computation, suppose you worked on 50 stones while at Mr. Graham's yard, am I to understand that all of these stone were too rough? A. Well, I did not line them all up.

Q. You did not line them all up? A. No, sir.

Q. Who did line them up? A. Well, I could not say, different ones.

(1112) Q. Sir? A. Different ones.

Q. Different ones? A. Yes.

Q. Did you line any of them? A. Yes, sir.

Q. Well, out of those 50, will you say how many you lined? A. Well, not many out of the 50.

Q. Well, how many, 5? A. I expect five.

Q. 10? A. No, I do not think I did.

Q. About 5? A. Yes.

Q. That is those stones—A. It may have been 1 to 10.

Q. Only 5 of those stones that came to you, of the 50 that you worked on, came to you before they had been lined up, is that right? A. Maybe about 5 or 10.

Q. What do you mean by lining out? A. By what?

Q. What do you mean by lining out? A. Lining out?

Q. Yes?

Mr. HARLEY: Lining up?

The WITNESS: Squaring them up.

Q. (Mr. HILL) Here is a stone in photograph No. 9, which was offered in evidence by the defense on Friday, the stone checked with a green pencil mark, is that stone lined up or not? A. Well, it has been partly lined up.

(1113) Q. Partly? A. Yes.

Q. Now, what remains to be done to that stone to make it fully lined up? A. Well, they lined that side up (indicating) and then they put that on (indicating) and of course they lined the other sides up.

Q. One side has been lined up? A. It looks like it, there are lines on those two sides (indicating).

Q. Has that stone been under the machine? A. Yes.

Q. Would that stone have to go under the machine before it was cut or not? A. Sometimes they put it under the machine after the lines were around it.

Q. Only about 5 of the stones that you received personally and know about, had not been lined up in that way before they came to you? A. No, sir.

Q. Now, you have spoken about stones being rotten. Now, about how many stones that came to you for cutting would you say were rotten? A. Very near half of them.

Q. That is about 25 out of 50? A. If I cut 50 stones, that would make it very near 25.

Q. What was done with those stones? A. Well, they were finished.

Q. They were finished? A. Yes.

Q. Do you know whether or not they were put in the building afterwards? A. No, sir.

Q. You do not know? A. No, sir.

(1114) Q. Did you work in Washington afterwards? A. Yes.

Q. What wages did you get in Washington? A. $3.60 a day.

Q. What did you get *a* Mr. Graham's yard? A. $3.60.

Q. Did you see any rotten stone put in the building over there at Washington? A. Well, I did not see none put in the building.

Q. Didn't see any put in the building? A. Did I cut some over there that was rotten?

Q. Did you see any Bethel stone over there in the building? A. Yes.

Q. You did? A. Yes.

Q. Could you tell whether any of it was rotten? A. Well, it was up high and I never got up there.

Q. What was done with this stone that you say was rotten and that you cut? A. In the yard?

Q. Yes? A. It was fixed up the best way I could.

Q. How, fixed up? A. Well, sometimes you would lower it and it wouldn't hold an edge and you would lower the bands and try to get it again.

Q. Did you ever see that done in any other granite yards? A. I do not know as I ever did have edges crumble out.

Q. What other granite yards have you worked at? A. I worked in New York.

Q. Where? A. At Hines.

Q. What granite did they use there, where did it come (1115) from? A. I could not say, it was all kind.

Q. Do you know what a header is? A. Yes.

Q. Can you say by looking at that course B. stone No. 38 whether that is a header or not (handing papers to the witness)?

Q. Do you know what they are? A. Blue prints.

Q. Do you know what setting plans are? A. I have seen some of them but I am not familiar with them.

Q. Do you know what the purpose of setting plan is? Do you know what a setting plan is used for? A. Yes.

Q. What for? A. For setting stone.

Q. Is it used in cutting stone? A. No, sir; we didn't use them.

Q. Can you tell from this setting plan what that stone No. 38 is? A. Not on there, no.

Q. Do you know what a header is? A. Yes.

Q. Did you ever cut anything out of the back of a header? A. Drill anything out?

Q. Yes? A. Sometimes.

Q. How much? A. Sometimes.

Q. Did you ever drill as much as half of the stone out of the back of a header? A. No, sir.

(1116) Q. Did you ever drill as much as the quarter of a cube out of the back? A. It is hard to get at, sometimes you drill a little bit and sometimes some more.

Q. Look at stone No. 38 on course B here, can you see that (indicating)? A. Yes.

Q. Now, how much of that stone did Mr. Graham cut away, do you know? A. I do not.

Q. Or how much on any of these headers? A. I do not know.

Q. Don't you know, as a matter of fact, that he cut away more than half of the back of the stone? A. No, sir.

Q. Now, this stone is shown on these setting plans as being half cut away, do you, or do you not, know that that stone came down in that block shape and all the back was cut away? A. I do not know, sir.

RE-DIRECT EXAMINATION.

By Mr. HARLEY:

Q. You say you only lined up about 5 of the stones that you worked on? A. Well, it may have been a little more, I do not remember: it was 5 or 10.

Q. Do you know how many were lined up by the drillers for you before they came into your hands? A. By the drillers?

Q. Yes? A. The drillers don't line up stone.

Q. Do you know how many were lined up for you by other men before they came into your hands? A. Well, I judge (1117) about 40 or 45 or something like that.

Q. 40 or 45? A. Yes.

RE-CROSS EXAMINATION.

By Mr. HILL:

Q. And they there were about 40 or 45 lined up for you and you lined up the other five yourself, out of the 50 that you worked on is that correct? A. Well, there may have been more or less; I could not say but that is as near as I can judge at it.

Q. On these stones that somebody else lined up for you how could you tell how much rough had been on those stones? A. Did I say?

Q. You said there was rough on them? A. I said those that I lined up.

Q. Then anything you said about rough stone applies only to the five you lined up yourself? A. That and what I see.

Q. What about those? A. I seen lots of those that were pretty rough.

Q. Did you know the dimensions of any of those stones? A. Well, I could see them when they were taking it off.

Q. When the other people were taking it off? A. Yes, sir.

Q. Do you know whether any of those were taken out of the back headers? A. No, sir.

Q. You do not know? A. No, sir.

(Examination of witness concluded.)

(1118) EDWARD F. DOUGLASS, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. HARLEY:

Q. What is your occupation, if you please sir? A. Granite cutter.

Q. Granite cutter? A. Yes, sir.

Q. How long have you been a granite cutter, if you please sir? A. Since 1893.

Q. Have you worked in Baltimore during all that time? A. Not all the time; I have been away from Baltimore several times.

Q. Are you familiar with the work on the National Museum job? A. Yes.

Q. Where did you work on that job, if you please sir? A. I worked in Baltimore and I worked in Washington also.

Q. You worked in Baltimore for Mr. Frank F. Graham, did you? A. Yes.

Q. How did you come to go to Washington? A. I simply got a job over there and went over.

Q. Following the job? A. Yes.

Q. How long were you working on that job in Baltimore, about how long? A. From start to finish.

Q. From start to finish? A. I think I was the second man that went to work on the job.

Q. From your experience in your business and occupa-
(1119) tion, do you know what the dimension blocks are, Mr. Douglas, please sir? A. Well, I judge they are quarried out to sizes given, that is to the best of my knowledge.

Q. Do you know according to the usage in your trade, how near the actual sizes they are expected to be quarried for dimension blocks? A. 1″ and ½″.

Mr. MCLANAHAN: One minute, please. This gentleman is a stone cutter, if your Honor please, and it has not been shown that he ever saw specifications or anything of that sort, or had any dealings with the quarry, and he hasn't yet testified that he ever saw the words dimension or net dimension in

any specifications, or had the sizes to compare with the stones, and it seems to us unless my brother proves that he, in some way, knows what that means by having come in actual contact with specifications, etc., he would be hardly competent as a witness to testify about it. We would like to know whether he has had anything to do with specifications at all, or dimension block. He simply, as I understand it, has a block handed to him and he is to cut it to a certain size, but he doesn't know whether it was random stone or what it was supposed to be. He doesn't know what the specifications were on which that stone was gotten and we object to the question.

Mr. HARLEY: Our understanding is that this witness spent his life working on dimension block.

The COURT: Ask him whether he knows what dimension block is.

Mr. HARLEY: I have already asked him that, if your Honor please.

Mr. MCLANAHAN: He comes here, if your Honor please, as a stone cutter.

The COURT: In examining the witness it is better to try to get at what he knows and I think that Mr. Harley may ask him what he knows. The witness has said that he worked on this job in Baltimore and Washington and Mr. Harley can ask him what he knows.

(Last question and answer repeated.)

(1120) Mr. HARLEY: How do you know that? A. Well, 1" and ½ or 2" would be plenty to work on. You can get a good solid surface on 1" and ½" or 2"; it really wouldn't require any more than ½" for a solid surface.

Q. Did you usually work on dimension block work yourself? A. As a general rule all the stone is dimension stone as a rule.

Q. Now, during the time that you worked on this job at the Graham yard, have you any idea how many blocks you worked on? A. I haven't the slightest idea.

Q. You have not? A. No, sir.

Q. Were they lined up when they came to you? A. Some were and some were not and some I lined up myself.

Q. Well, now, what do you mean by lining them up? A. Getting them ready for the surface machine, that is the first start in cutting stone.

Q. Why was it necessary to do that? A. Otherwise we couldn't get a good surface on them, unless we put the lines around them.

Q. Now, were the stones which you handled received at the yard in dimension blocks or not, Mr. Douglas, if you know?

(1121) A. I could not answer that question.

Q. How is that? A. I could not answer that question whether they were received as dimension stock or not.

Q. In what shape were they received, if you know?

The COURT: When they came under your observation? A. Some of them were pretty rough; some of them I had quite a lot of rough to take off of them.

Q. What proportion of them about? A. The proportion of the one stone?

Q. What proportion of the stones which came to you would be under that head of "pretty rough"? A. I could not say just exactly; I would not like to answer that question but there were more than five anyway. I will answer that.

Q. Had any of them been drilled up and lined up before they reached you? A. Yes.

Q. Who did that? A. Well, as a rule Mr. Graham had laborers to do the drilling and stone cutters to do the lining.

Q. Why was it necessary to have the drillers, if you know? A. I presume it was necessary because the drillers were cheaper.

Q. Is it necessary to drill dimension block? A. Well, it pays the contractor to get it down as neat as he possibly can before he gives it to the stone cutter.

Q. It pays him to do that? A. Yes, sir.

Q. Was there anything else the matter with the stone, except rough, Mr. Douglas? A. Some of it was very hard to get edges on, I will admit that.

(1122) Q. How much of it was hard to get edges on? A. I could not answer that question. There was some I worked on that was pretty hard to get edge on.

Q. What proportion of it? A. The whole stone, if one portion of it is bad, as a rule the whole stone is bad.

Q. Did you see the stone when it came into the yard, that is independently of the stone which you worked on? A. Yes, sir.

Q. Did you see any slabbing off? A. I saw slabbing off on stone that I was not working on, yes, sir.

Q. How much? A. Well, I presume about 8" or possibly 10".

Q. 8 to 10"? A. Maybe more, I could not say.

Q. How frequently did you see this slabing off going on among the other men? A. Well, I could not just count the number of times.

Q. Were they doing it every day? A. No, I could not just say that I saw them doing it every day, they may have possibly been doing it and I did not see them.

Q. About how frequently did you see that work going on? A. As I say I could not answer just to the number of times; I have seen it quite frequently but I cannot answer the number of times.

Q. Did you pass out among the other men?

The COURT: He is not your witness, Mr. Harley.

Q. What part of the work did you do? A. Generally I was finishing; I finished the best part of the time that I was working for Mr. Graham.

Q. What part of the yard did you work in? A. I worked
(1123) in both parts; I worked mainly in the circle shed.

Q. Surface shed? A. Circle.

Q. What portion of the yard is that in? A. That is in the west end of the yard. Mr. Graham has a gid shed that is called a flat shed and the other one is called the circle shed.

CROSS EXAMINATION.

By Mr. HILL:

Q. For whom are you working now? A. The Baltimore Stone Cutting Co.

Q. Is Mr. Graham connected with that in anyway? A. He is president of the company, I presume.

Q. Then you are working for Mr. Graham himself, are you not? A. Yes.

Q. What work are you doing for him now? A. Cutting stone.

Q. Granite? A. Yes.

Q. What is that granite for, what job, do you know? A. Working on the Fidelity Building and working on the Baltimore City Pumping station.

Q. Now, this work for the Fidelity building, where does this granite come from? A. Granite, Md.

Q. The stone that you get down from there that you cut, do you receive them just as they come from the quarry? A. Yes.

Q. How many inches do they run over the finished dimensions? A. I never kept no tab on them.

(1124) Q. Can you say? A. Sometimes 2 or 3″ and possibly more at other times.

Q. Do they run as many as 5″? A. Yes, sometimes.

Q. Now, what kind of blocks would you call those blocks, would you call them dimension blocks? A. I presume he or-

dered them as dimension stock. As I stated before all the work we did was mostly dimension block.

Q. Would you call 4 or 5" over dimension block? A. Yes, if it was sent there for that purpose. I would not class that myself as dimension block.

Q. You spoke about seeing them slab off 8 or 10"? A. Yes.

Q. How many stones did you see treated in that way. 5? A. Possibly 5.

Q. And may be not as many as 5? A. It may not have been 5.

Q. It may not have been as many as five? A. I cannot answer that question.

Q. Do you know whether or not that slabbing was done out of backs or headers? A. No, sir.

Q. What was it out of? A. One was off the column bases.

Q. You mean a column cap? A. A column cap, yes. Then there was one stone I worked on particularly, a bottom part of the base, I took 8 or 9" off of that myself.

Q. You did that yourself? A. Yes, sir.

Q. But those stones that you saw that slab taken off of would not be more than 5 to your recollection? A. Well, possibly not more than 5, but I cannot answer just to the exact number.

(1125) Q. When was the occasion that you saw this? What date? Was it about the first part of the contract or the last part of the contract at Mr. Graham's yard when you saw that number of inches taken off of these stones? A. Well, as a rule, I would judge about the middle part of the job.

Q. The middle? A. Yes, the middle part of the job when I noticed it.

Q. How long did you work at Mr. Graham's yard on this work? A. From start to finish.

Q. How many months was that? A. I think, if I have got the dates right, we started on the 6th day of March and wound up on the 7th day of March the year following. I think they are the right dates.

Q. When he wound up, did you stop working in Mr. Graham's yard? A. I had to, he shut down.

Q. Why? A. I could not answer that; there was trouble with the White stone job but I do not know what it was.

Q. Were you paid off then? A. Yes, in full.

Q. When were you told to come back again? A. I was told to get another job if I could find one.

(Thereupon at 2:45 p. m., court adjourned to meet again tomorrow morning at 10 o'clock a. m.)

JOHN Q. SHEEHY, a witness heretofore produced and sworn, called on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

(1126)

Q. (Mr. GAITHER) Please look at the paper which I now hand you and state whether or not that is the original contract and specification between Bernard R. Green, Superintendent of Construction, and the Thompson-Starrett Company, for the furnishing of the contract for this building?

(Mr. HILL: I would like to look at that, your Honor, before the question is answered.)

(Specifications and contract referred to were then shown to counsel.)

Mr. HILL: I object to that question on this ground, if this should be the contract between the Thompson-Starrett Company and Bernard R. Green for the furnishing of this granite, on the ground that *is it* totally irrelevant and has nothing to do with this case. We object to that question.

Mr. GAITHER: I think we are entitled to have that paper identified. We have not offered it as yet.

The COURT: You can answer that question.

Mr. HILL: We note an exception.

A. This is the contract with the Thompson-Starrett Company.

Mr. HILL: Ask him if he knows that from his own personal knowledge.

Q. (Mr. GAITHER) I am going to ask him that question. Look at the signature of the witness to the contract and state whose signature it is? A. There s an attestation by Mr. Morton. the Secretary-Treasurer of the Thompson-Starrett Company, and I witnessed Mr. Green's signature.

Q. That is your own witness to Mr. Green's signature? A. Yes, sir.

Q. You recognize that as Mr. Green's signature, do you (1127) not? A. Yes, sir.

Mr. GAITHER: Now, we offer this paper so far as it refers to the furnishing of this rough stone for the south pavilion.

We want to show how it was delivered, and and we will show that there was no way to compel the delivery of this stone for a year or two after the completion of Mr. Graham's contract. We will show that Mr. Green could not enforce the delivery of this stone during the period of Mr. Graham's contract.

(Said specifications and contract are fully set forth in the thirty-seventh assignment of errors hereinbefore inserted in the record; and it is hereby agreed that this reference thereto shall operate as fully and effectually as though said specifications and contract had been herein set forth at large.)

Mr. HILL: We object to that.

The COURT: I sustain the objection.

To the admissibility in evidence of said contract and specifications the plaintiff then and there objected; and the court sustained the said objection and refused to admit said contract and specifications in evidence.

Mr. GAITHER:: Note exceptions for both defendants.

To which action of the court in sustaining the objection of the said plaintiff to the admissibility in evidence of said contract and specifications and in refusing to admit said contract and specifications as evidence, the defendants and each of them then and there excepted, and prayed the court to sign and seal this, their thirty-first bill of exceptions which is accordingly done, this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Thirty-second Bill of Exceptions.

(1128)

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their thirty-second bill of exceptions, at the trial of this case, the defendants, to prove the issues on their part, offered and produced evidence as follows.

Q. Now, will you state whether or not Mr. Bernard R. Green did not in writing extend the time of the completion of the original contract with the Thompson-Starrett Company until June 30, 1907? A. He extended the completion of the cut stone part of the contract, not the rough stone.

Q. Until June 30, 1907? A. That was cut stone under the Thompson-Starrett contract.

The District Attorney then and there objected to the said questions and answers in this bill of exception heretofore set forth, and moved the court to strike out said questions and answers and the court then and there sustained the objection of the United States and ordered said question and answers to be stricken out.

To which action of the court in so sustaining the objection of the United States to the said questions and answers and in striking out the same the defendants and each of them then and there excepted and prayed the court to sign and seal this, their thirty-second bill of exceptions which is accordingly done, this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Thirty-third Bill of Exceptions.

(1129)

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their thirty-third bill of exceptions, at the trial of this case, the defendants, to prove the issues on their part, offered and produced evidence as follows:

Q. I now ask the witness to identify this signature or state whether or not this is a signature of Bernard R. Green to a letter of February 8, 1908, to the Thompson-Starrett Company of Northfield, Vermont? A. That is Mr. Green's signature.

Q. Do you know whether or not that letter was sent? A. Yes, sir; it was sent.

Mr. GAITHER: We offer this letter in evidence. It refers to the delivery of this stone. It is a letter of February 8, 1908.

Mr. HILL: I object to that. It is a letter from Mr. Green to the Thompson-Starrett Company. It apparently refers to this stone. It could not be offered to show any omissions or delay on the part of Mr. Green. Mr. Green has been on the stand here and he can be brought back by the other side, but they cannot bring letters here which were written by Mr. Green to the Thompson-Starrett Company with the intention of helping and hurrying everybody on the contract and then use these letters to sustain their contention. We object to that.

The COURT: I overrule the objection.

Mr. HILL: Note an exception, please.

(Mr. Gaither then read the letter of February 8, 1908, from Mr. Bernard R. Green to the Thompson-Starrett Company (1130) of Northfield, Vermont, to the jury.)

February 8, 1908.

Thompson-Starrett Company,
Northfield, Vermont.

Gentlemen:

You must be aware that the quarrying and shipment of stone for the south pavilion of the National Museum building, under your contract, has been going very slowly for a long time, and more than a year has elapsed since you began on it. The greater part of the small stones are out, but very few of the larger ones required for the cornices and the work that will be needed to enable the building to be built. Hardly two-thirds of the stock has been quarried yet. The work has not been receiving the attention it has demanded in the quarrying of the large stones, and it has become evident that the stone cutting and the consequent slow progress of the construction will carry the rotunda work into next summer.

Q. You have asked for the payment of the small balance between the amount deducted from your cutting contract for delay and the total amount unpaid, and I am not feeling warranted in doing this or keeping up closely, as heretofore with the payments on the shipments of stock, until a much better progress has been made in the quarrying. You are still in danger of charges for delaying the construction of the building, and it behooves you to enter upon and adhere to much more effective operations in the quarry.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

(1131) Mr. HILL: It seems to us totally improper to allow these letters to be brought in in this way. Mr. Green was here on the stand and I think he should be allowed to testify as to what he meant by these letters.

The COURT: I overrule the objection.

Mr. HILL: And we will note an exception.

Q. (Mr. GAITHER) Please look at the letter which I now hand you from Mr. Bernard R. Green, Superintendent of Con-

struction, to the Thompson-Starrett Company and state whether or not that is Mr. Green's handwriting?

The WITNESS: The letter?

Mr. GAITHER: No, the signature?

A. Yes, sir; that is his signature.

Mr. GAITHER: This is dated February 29, 1908. I offer this letter in evidence.

Mr. HILL: We object to that letter.

The COURT: Overruled.

Mr. HILL: Note an exception, please.

(The letter of February 29, 1908, from Bernard R. Green to the Thompson-Starrett Company was then read to the jury by Mr. Gaither.)

February 29, 1908.

Thompson-Starrett Company,
#51 Watt Street,
New York City.

Gentlemen:

In furnishing for Mr. Graham, in Baltimore, the remainder of the granite stock required under your contract for the (1132) construction of the south pavilion of the National Museum building, you are directed to give special and principal attention to the north, east and west pediments and the drum and entablature of the dome, so that these parts may be built up, as it is intended to do, in advance of the south pediment and main entablature on the colonnade. This order is due to the delay in the contract work and the consequent necessity of building up the rotunda and dome in advance to permit the same to be covered in.

As to your letters of the 13th and 20th instant, in reply to mine of the 8th, they are so testy and threatening in temper, as well as *precious* and unreasonable in argument, that I have thus far not undertaken to answer them, but may say that, as to the payments for work done, now particularly concerning the stock being furnished, I propose to do, as heretofore, exactly according to your expression in letter of the 13th

and make payments "as per the terms of the contract." These are as follows:

Specification paragraph 43:

"Payments in general will be regulated by the promptness, system and good progress made by the contractors."

General Conditions, paragraph 41:

"Payments will be made from time to time as the progress of the work may warrant", and it is my business to judge of this.

The paying you of the nominal price per foot for stones furnished to the present time has already amounted to an excessive payment, because the average of the sizes furnished is materially below the general average of the contract.

The time of completion required for furnishing the stock is next April.

The alleged slowness of the supply of drawings for you to work by in the first six or eight months of the job was mainly due to the slowness with which you filled the orders you already had. You consumed nearly the whole of that period in (1133) quarrying the stone up to course Q, most of which were easy stone to furnish. In the meantime Mr. Graham, in Baltimore, was bitterly complaining of want of stock to enable him even to begin the cutting, which did not occur until May. Your first carload was not shipped until January 17, and the second one April 22, 1907, and each car was about a month on the road.

Yours respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Mr. GAITHER: Now I want to offer in evidence a lease of this quarry in Bethel by the Thompson-Starrett Company to Bernard R. Green, Superintendent of Construction, made on the 31st day of October, 1904.

(Lease referred to was then shown to counsel.)

Q. Look at this paper and state whether or not that is the lease from the Thompson-Starrett Company to Bernard R. Green of the quarry in the town of Bethel, Vermont, from

which this stone came. A. This is a lease bearing Mr. Green's signature and that of the Thompson-Starrett Company.

Q. Hasn't it got your signature too? A. Yes, sir; as a witness.

(Said lease by Thompson-Starrett Company to Bernard R. Green, Superintendent of Construction, is fully set forth in the thirty-ninth assignment of errors hereinbefore inserted in the record; and it is hereby agreed that this reference thereto shall operate as fully and effectually as though said lease had been herein set forth at large.)

Mr. HILL: I object to that, your Honor. (Objection sustained.)

To the admissibility in evidence of said lease the plaintiff then and there objected; and the court sustained the said objection and refused to admit said lease in evidence.

To which action of the court in sustaining the objection of the said plaintiff to the admissibility in evidence of said lease and in refusing to admit said lease as evidence, the defendants and each of them then and there excepted, and prayed the court to sign and seal this, their thirty-third bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Thirty-fourth Bill of Exceptions.

(1134)

After the matters set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their thirty-fourth bill of exceptions, at the trial of this case, the defendants to prove the issues on their part, offered and produced evidence as follows:

Q. Do you know who Mr. R. J. Tracewell is? A. There is a man by that name who is the Comptroller of the Treasury.

Q. Didn't you receive some communications from him regarding this contract? A. We received communications from the Comptroller regarding all contracts as far as the disbursements are concerned. He interprets the Acts of Congress for us.

Mr. GAITHER: We will call on you for a letter from Mr. R. J. Tracewell under date of December 29, 1908.

Mr. HILL: We have never heard of that letter, and even if we have that letter we decline to produce it.

Q. (Mr. GAITHER) Please look at this copy of a letter of December 29, 1908, from Mr. R. J. Tracewell, Comptroller, to Mr. Bernard R. Green, and state whether or not you remember such a letter being received?

(Letter referred to was then shown to counsel.)

Mr. GAITHER: And state whether or not this is a fair copy as far as you remember.

Mr. HILL: I object to that. Objection sustained.

(1135) ALPHONSO W. SHILLING, a witness of full age, having been duly sworn testified as follows:

DIRECT EXAMINATION.

Q. (Mr. GAITHER) Please tell the gentlemen of the jury what your occupation is and how long you have been so occupied? A. At present I am assistant observer of the United States Weather Bureau. I have been in the Weather Bureau since February 21, 1898; that is, I started in and worked my way up.

Q. What office are you now in? A. In the Baltimore Office.

Q. Have you the record of the Weather Bureau showing the state of the weather in Baltimore during the months of December, 1907, and January and February, 1908? A. Yes, sir.

Q. Will you kindly refer to the records for December, 1907?

Mr. HILL: We object unless we know the purpose of (1136) this testimony.

Mr. GAITHER: We want to show the character of the weather here during the time of this contract.

The COURT: For what purpose?

Mr. GAITHER: For the purpose of showing how many days were rainy and snowy and how many days the temperature was under the freezing point and so on. We want to

show the expense involved in doing the work under such weather conditions as we had here then.

The COURT: I do not understand that Mr. Green made any complaint at all as to Mr. Graham's slowness or delay in cutting. There was a time mentioned in the contract for the completion of his work, but there was no complaint at all as to his not having completed it at that time.

Mr. GAITHER: But we want to show that this granite was piled in on us when we could not do the work, and thereby our yards became overcrowded. We will show that the men could not do the work during these months. If I have a contract for you to deliver goods to me in the summer and you deliver it in the winter when I cannot do the work, that is certainly a reason for me not going ahead with the contract.

The COURT: But I understand that in March, 1908, Mr. Graham quit the job.

Mr. GAITHER: We will show the condition of the weather for the three months previous to that.

Mr. MCLANAHAN: But we had nothing to do with this matter of transportation at all. As long as Mr. Graham was getting the stone, that was all that was necessary under the contract, and if he was getting too much stone, then he could have stopped it. Under the contract we could have delivered all that stone in a lump, in one or two days, and as your Honor (1137) said, we did not complain of any delay.

Mr. GAITHER: Our original contract was to have all this stone furnished by October, 1907, and we sat idle during all the months that we could have worked, and we claim it is not within the power of the Government to then throw this stone on us when we could not do the work and expect us to go ahead with it.

Mr. HILL: If your Honor please, we make further objections on this ground; the undisputed testimony up to this point in the case is that Mr. Graham abandoned the contract. His own witnesses testified that they quit work and were paid off and were told to get other jobs. He abandoned the contract and the Government did not close the contracts at all. If because of the delay the Government had cancelled the contract, then there might be some reason for offering this testimony as to the weather and the other things, but the testimony is

that Mr. Graham abandoned the contract, and of course the Government then did the only thing they could do, they took it over and completed it.

(After argument.)

(1138) The COURT: I will take the testimony subject to exception. I do not see the materiality of it. Can't you condense it?

Mr. GAITHER: Yes, your Honor, I will. We have a statement here of the weather at that time.

Mr. HILL: I understand that is to be taken subject to exception. What will be done after the testimony is in?

The COURT: You can move the court to strike it out and take it from the jury.

Q. (Mr. GAITHER) Have you the original record for those months? A. Yes, sir.

Q. Will you look at the record for the months of December, 1907, and state how many days in that month there was either rain or snow in Baltimore during the period from 8 a. m. to 5 p. m.?

The COURT: Well, can't you condense that?

Mr. GAITHER: I have it here. Here is a copy which was handed us by the Weather Bureau.

The WITNESS: That would be a great help; the hours were what?

Mr. GAITHER: From 8 a. m. to 5 p. m.

A. Well, there were 11 days in December.

Q. Will you look through the maximum and minimum of temperatures between 8 a. m. and 5 p. m. for that month and state how many days there were when the maximum was 42 or under? A. There were 15 days 42 or under.

Q. How many days were there when the temperature was 32 or under minimum during the same hours? A. Eleven days 32 or under.

Q. Now, sir, will you take the month of January, 1908, and state first how many days there were in that month when there was either rain or snow at some time between 8 a. m. and (1139) 5 p. m. A. There were eight days in January, 1908.

Q. Will you kindly tell us the number of days when the maximum was 42 or under between 8 a. m. and 5 p. m.? A. Twenty days.

Q. And how many days when the minimum temperature was 32 degrees or under? A. 15 days.

Q. Now, will you take February, 1908, and state the number of days in that month that there was rain or snow at any time between the hours of 8 a. m. and 5 p. m.? A. Nine days.

Q. Now, the number of days that the maximum temperature was 42 or under between 8 a. m. and 5 p. m.? A. Twenty-three.

Q. And the number of days when the minimum was 32 degrees or under? A. Nineteen days.

Q. Those temperatures are all Fahrenheit, are they not? A. Yes, sir.

Q. What is the freezing point by Fahrenheit? A. 32 degrees.

(No cross examination.)

(Examination concluded.)

OTTO KUBITZ, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) What is your occupation, if you please? A. I am a civil engineer.

Q. Are you in the employ of the city? A. Just at present, yes, sir.

(1140) Q. In what department? A. The Building Inspector's Department.

Q. How long have you been in the Building Inspector's Department? A. Since the fall of 1903.

Q. As an engineer are you familiar with drawings, blueprints and specifications? A. Yes, sir.

Q. Have you examined the original drawings in this case, these nine drawings (indicating)? A. Yes, sir.

Q. You had them in your possession several days, I believe? A. Yes, sir.

Q. Together with whom? A. Mr. Barre.

Q. You are also familiar with the setting plans, I believe? A. I had them with me.

Q. And the changes which were shown on the setting plans? A. Yes, sir.

Q. Now, you were requested by me to figure out the cubic contents of the stone called for in the original drawings in this case? A. Yes, sir.

Q. Have you done so? A. Yes, sir; I have.

Q. Now, in your calculations have you made allowances called for in Section 32 of the specifications? A. Yes, sir.

Q. You have made those allowances? A. Yes, sir.

Q. Just exactly as these specifications require? A. Yes, sir.

Mr. McLANAHAN: You say you submitted the setting plans as well as the original drawings. Which did he base (1141) this on, the original drawings or the setting plans?

Mr. HARLEY: The original drawings.

Q. According to the original drawings and specifications what are the cubical contents of pavilion "C"?

The COURT: You mean the number of cubic feet of stone?

Mr. HARLEY: Yes, sir; just exactly as called for in the original drawings, the original contract and specifications.

A. There are 59,368.3 cubic feet.

FERDINAND BARRE, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) What is your profession? A. General Manager of the Armored Concrete Company of Baltimore City.

Q. Where were you born? A. In France.

Q. And educated in your line in France, I believe, sir? A. Yes, sir.

Q. What are your qualifications in the engineering line, Mr. Barre?

The COURT: What training have you had as a civil engineer? A. I am a reinforced concrete engineer and I graduated from the School of Art in Limoges, France.

Q. When was that? A. 1893.

Q. Are you familiar with construction work? A. Yes, (1142) sir.

Q. And are you familiar with stone construction work? A. Yes, sir; I did a great deal of that work in France.

Q. Are you familiar with blue prints and plans? A. Very well.

Q. Have you examined the original drawings in this case? A. Yes, sir.

Q. You had them in your possession for two or three days I believe? A. Four days.

Q. Who has been working on them with you? A. Mr. Otto Kobitz.

Q. Have you, together with him, figured out the number of cubic feet of stone shown on the original drawings in this case? A. Yes, sir.

Q. What is it, if you please? A. 59,368 cubic feet and three-tenths.

Q. In that calculation have you allowed for the joints as set forth in Section 32 of the specifications? A. Yes.

Q. So that is net according to the specifications and the contract? A. Yes, sir.

GEORGE T. PARKER, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) What is your occupation? A. Assistant to the President of the Title Guarantee and Surety Company.

(1143) Q. In 1906 and 1907 and 1908 what were you? A. I was general agent of the Title Guarantee and Surety Company in Washington, D. C.

Q. Your office wrote the bond in this case? A. Yes, sir.

Q. Did you, as the company's representative, receive this letter of March 11, 1908 (indicating)? A. Yes, sir.

Q. What was the first information after the bond was written in this case of any notice of any kind or character which you received from Bernard R. Green, or any one else on his behalf, with relation to this contract? A. This communication here.

Q. You are referring to the letter of March 11, 1908? A. Yes, sir.

ALFRED MASON, a witness of full age, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. HARLEY) Mr. Mason, what is your occupation, please? A. Architect.

Q. How long have you been an architect? A. Forty years.

Q. About forty years? A. Yes, sir.

Q. Name some of the buildings in Baltimore for which you have been architect? A. The Western High School and the Schloss Building at Paca and Baltimore streets.

Q. Are you familiar with the Graham job, I mean the work on the contract mentioned in this case? A. I made the setting plans.

Q. I requested you to figure out the number of cubic feet in the building exactly as shown in the original drawing-
(1144) ings and the original contracts and specifications. Have you done so? A. Yes, sir.

Q. And this (indicating) is the result? A. Yes, sir.

Q. How many cubic feet is it? A. 59,776 feet.

Q. Did you make the allowances for joints called for in Section 32 of the specifications? A. I did not.

Q. State whether or not that accounts for the difference between your calculation and that of Messrs. Barre and Kubitz?

Mr. McLanahan: I think that is rather leading.

The Court: It certainly is.

Q. About what would those joints amount to. Read Section 32? A. I have read it.

Q. Would those joints or not amount to that difference? A. They would about.

Q. You stated, I believe, that you made the setting plans in this case? A. Yes, sir.

Q. These setting plans (indicating)? A. Yes, sir.

Q. Now, turn to setting plan No. 1. A. This is it.

Q. Could you make this setting plan No. 1 until you had received the full sized detail drawings, Mr. Mason? A. No, I could not.

(1145) Q. Just as Mr. Green said you could not make it until these full detail drawings were furnished? A. Yes.

Q. Now, this is a letter of November 9. Did you receive this letter?

Mr. Hill: I object to that letter being shown to the witness to refresh his memory, when it was neither written to him nor by him. If Mr. Harley wants to tell the witness the date I have no objections.

Mr. Harley: The letter was addressed to Mr. Graham and it refers to the work which this man did.

Q. Did anybody else work on the setting plans for Mr. Graham? A. No, sir.

Q. Who conducted the correspondence with reference to the setting plans for Mr. Graham? A. I did.

Q. Have you seen that letter (indicating)? A. Yes, sir.

Q. When you got the full sized detail drawings, what did you do? A. The drawings we wanted were for the base—

Mr. HILL: I haven't heard the witness answer as to this letter, yet.

Q. Did you receive this letter which I showed you? A. Yes, I got that from Mr. Graham.

Q. (Mr. HILL) You got it from Mr. Graham? A. Yes, it was sent to me.

Q. But you did not receive it from Mr. Green? A. No, sir.

Q. (The COURT) When was it given to you? A. I cannot tell that; it was sent to me because it referred to the plans. (1146) That was the custom. I could not swear that it was sent on the day marked; I remember that the letter came to me and I kept it.

Q. When did you receive the detail drawings? A. I couldn't tell, but it was about that time.

Q. About this time? A. Yes, sir.

Q. This letter says: For use in connection with your contract for the granite work for the south pavilion of the National Museum building, the following full sized details are sent you by this mail, in a separate package." You don't know what particular day, but about that time you received them? A. Yes.

Mr. MCLANAHAN: That is, November 9, 1906.

Q. What did you then do? A. I commenced on the setting plans.

Q. You have been in court here and you have heard the kind of setting plans that you make criticised. What have you to say as to that? A. Well, in my opinion this is the best way to make setting plans. *I* shows each stone separately. It shows its connection with the adjoining stones; it shows its connection with the faces of the walls and the returned walls better than any other way; I am not speaking entirely on my own account, because I was *compliments* by Mr. Ernest Lang, one of the principal architects in this country, or I might say, in the world, who told me that my drawings—

Mr. MCLANAHAN: We object to that.

Q. Which shows the more detail, this kind of setting plan or the setting plans which Mr. Harris referred to? A. This shows the more detail.

(1147) Q. Explain how it does that? A. It shows the molding and the bases better than the elevation alone would show it.

Q. The elevation shows how many dimensions? A. This shows the elevation and the bed and the section through all at the same time, and the other way you would have to make three plans to show that and the lettering and figuring on that would amount to as much work as this, in fact I think more.

Q. Did Mr. Green at any time complain of plans? A. Not to my knowledge.

Q. Did he ever write you any letter or make any complaints as far as you know?

Mr. McLanahan: Our letters were to Mr. Graham and we have offered letters showing that we did complain to Mr. Graham as to these plans.

Mr. Harley: I beg your pardon. Let us stick to the record. The letter of October 26—

Mr. McLanahan: The letter of October 20.

Mr. Hill: If Mr. Harley informs us that Mr. Green ever wrote any letter to this gentleman at all, that will save time.

The Court: But there were not letters addressed to Mr. Mason.

Mr. Harley: No, sir.

Q. You heard this letter of October 20, 1906, read in court, did you not? A. Yes, I heard that read.

Q. Did you ever know anything about that letter? A. No, I never heard of it.

Q. When you sent this on did you receive any objection of any kind or character to this plan?

Mr. McLanahan: We object.

The Court: How could he receive any objection? This

(1148) letter was sent to Mr. Graham and this gentleman says he never saw it.

Mr. McLanahan: I will read the letter.

(Reading letter referred to said letter having been heretofore inserted.)

Q. Will you look at that letter of December 21, 1906, and state if you have seen this letter? A. Yes, sir.

Q. By whom was it submitted to you? A. Mr. Graham; he used to send all the letters referring to the drawings to me.

Mr. HARLEY: This letter reads (reading letter of December 21, 1906):

"Washington, D. C., December 21, 1906.

"Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

"Sir:

"The tracings of setting plans Nos. 1, 2 and 3 of the granite work of the south pavilion of the National Museum building under your contract for the cutting, received from you a day or two ago, have been checked over by the Architects and such corrections as were found necessary have been made. The drawings are now returned to you approved, in a separate roll, and a set of blue prints have been sent to the contractor for the stock, requesting very early shipments of the rough stone to you.

"Yours very respectfully,

"BERNARD R. GREEN,
"Superintendent of Construction.
"Per J. Q. S."

(1149)

Q. Was that the drawing as received from Mr. Green? A. No, it came back to us with some remarks in the letter which I received from Mr. Graham about not showing the joints and asking him to make the figures a little larger. That was the only objection I heard to them.

Q. Here is a letter of December 1, addressed to Mr. Graham; is that the letter to which *to* refer? A. No, this is not the one to which I refer.

The COURT: For what purpose are you going over all this?

Mr. HARLEY: I would have been through with him by this time if it were not for my brothers. I just wanted to show that he prepared these setting plans promptly. The Government has contended that he did not, and we want to show that he did.

Mr. HILL: We will not object to any such evidence, but this testimony does not tend to prove that.

Q. Look at setting plans Nos. 2 and 3; they were also approved December 20? A. Here they are.

Q. Now, get us 4 and 5. A. Here are 4 and 5.

Q. These were prepared and were approved by Mr. Green January 22nd, 1907? A. Yes, sir.

Q. Now, get No. 6? A. This is No. 6 (indicating).

Q. When was that approved—what does that February 2nd on here mean? It was approved February 9, '07? Now, what does that February 2nd mean? A. That is when I finished the drawing.

Q. Do you remember when you sent it down to Mr. Graham? A. No, I do not.

(1150) Q. I asked you to figure out for me how many cubic feet there are represented by setting plan No. 1? A. 1,899 feet 7/12 inches.

Q. And setting plan No. 2, about how many? A. 6,381.

Q. 6,381 cubic feet and a fraction, is it not? A. Yes, sir.

Q. And No. 3? A. 1,962.11.

Q. And No. 4? A. 1,231.11.

Q. No. 5? A. 1,291.10.

Q. And No. 6? A. 1,430.9.

Q. That makes altogether approved up to February 9—A. 14,206 feet.

Q. 14,206 cubic feet? A. Yes, sir.

Q. Now, look at setting plan No. 7, that is the one which Mr. Green stated he received on March 20. You had over 14,000 cubic feet drawn ahead. Mr. Green said he received that March 20 and last approved it on August 20. Will you tell the gentlemen of the jury whether you could go ahead with setting plans 8, 9, 10, &c., until the changes which Mr. Green made in setting plan No. 7 were completed? A. I could not.

Q. Why? A. The molding which rested on the cornice on the columns was undecided about. We could not go along until we knew what they would do. It might have affected the jointing or it might not, and then changes were going on all the time. It was changed so many times that it was not finally approved until August.

(1151) Q. August 20, I think it was? A. Yes, sir; and then it was sent back.

Q. Sent back by whom? A. By Mr. Green.

Q. To whom? A. To Mr. Graham, and it came to me.

Q. Even after August 20? A. Yes, sir; and once it came on account of these figures (indicating).

Q. Was it practical or safe for you to go ahead with these drawings, jumping from one to the other? A. It was not.

Q. Explain why. A. Because the work connected with it was undecided; the molding resting on the cornice—that part

of the cornice (indicating) runs through the whole width of the drawings and is connected with the ceiling and it was decided afterwards to put it here (indicating); they kept us waiting a considerable time; the first detail came from the architects afterwards on the white paper, I remember, and not on the brown paper such as the majority of those were made.

Q. Did you prepare these setting plans in accordance with section 9 of the specifications?

Mr. McLanahan: We object to that because this witness is not the court and therefore he cannot say that he prepared them in accordance with the specifications; he can say what he did and your Honor will say whether they come up to the contract.

(1152) Q. In your 40 years' experience as an architect have you become familiar with building plans? A. Yes, sir.

Mr. Hill: This is not a building specification but a contract for cutting stone.

The Court: Can't you put your question some other way.

Q. (Mr. Harley) You are an architect of 40 years' experience. Have you had any experience in preparing setting plans? A. Yes, sir; considerable.

Q. Have you had any experience doing the architectural work for stonecutters? A. I have.

Q. Have you had any experience doing architectural work in connection with stone cutting and building? A. Yes, sir.

Q. Look at specification No. 9 and state whether or not you prepared these setting plans in accordance with that specifications?

The Court: Just read that specification.

Mr. Harley: Yes, sir. (reading)

"The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stonework, showing fully every separate stone in the work."

Mr. McLanahan: Keep on, read the rest of it.

Mr. Harley: I certainly will if you will keep quiet and permit me.

"These plans shall be tracings at one-quarter-inch to the foot scale (¼″=1′), prepared, lettered and numbered as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commence-
(1153) ment of the work on the cutting of the stones they represent, to give ample time for examination and approval. The setting plans for the lower courses of the basement story (the first courses to be cut) must be prepared and submitted immediately after execution of the contract."

Q. Now, did you prepare these setting plans in tracings of ¼ inch equal to the foot? A. Yes, sir.

Q. (Mr. HARLEY) Were these setting plans prepared and lettered and numbered as ordered by the Superintendent of Construction, Mr. Green?

Mr. MCLANAHAN: We object to that. He cannot say whether they were prepared, lettered or numbered according to what Mr. Green told him. Mr. Graham might say that, but Mr. Mason can't testify to that.

(After argument.)

The COURT: I think he can answer it.

Mr. HARLEY: Will you read that question, Mr. Wein-
(1154) berg?

A. I believe so, to the best of my knowledge.

The COURT: It is not very material.

Q. There was a missing setting plan for which the blueprint was furnished by the other side. Can you remember when that was sent down to Mr. Green? A. The first was mailed December 22.

Q. What year? A. 1907.

Q. What plan was that? A. The ceiling plan.

Q. This is the second one, drawing No. 28, is it not? A. Yes, sir.

Q. Now, the first one you mailed on December 22 and that got lost in the mail; do you know when you sent the second one? A. It was the twenty-second day of December—that was the day it was mailed.

Q. Yes, that is the first one; now, when did you mail the second one? A. I waited some time to see if the post office officials could find the other one, and afterwards I sent this
(1155) one out on February 27.

CROSS EXAMINATION.

Q. (Mr. HILL) Mr. Mason, in making up the setting plans which you have testified you have made in this case, were you familiar with section 9 of the specifications which has just been read to you by Mr. Harley? A. I had a copy of the specifications and I read it.

Q. Do you consider that in making up the specifications you followed out the provisions of Section 9? A. Yes.

Q. That is your opinion? A. Yes.

Q. Now, section 9 says: "The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at one-quarter-inch to the foot scale ($\frac{1}{4}''=1'$), prepared, lettered and numbered as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of the work on the cutting of the stones they represent, to give ample time for examination and approval." You have testified that Mr. Graham turned over to you all the letters that he received from Mr. Green in reference to the setting plans; is that correct? A. I believe, so, yes.

Q. You believe that to be so? A. Yes, you have all the letters which I received.

Q. But you made the statement to Mr. Harley that you received all the letters that Mr. Green wrote to Mr. Graham in reference to the setting plans? A. I said that but I told you I had not seen that one letter. That was before the contract was signed and before I had any drawings to make.

(1156) Q. *The*, am I right in understanding that with the exception of the letter of October 20, 1906, you received all the letters that Mr. Green wrote to Mr. Graham in reference to the setting plans? A. I believe so.

Q. Please think carefully about that; I do not want to confuse you, but I have some questions to ask you about that. A. As far as I know I did.

Q. Is it your opinion that you did receive all of them? A. Yes.

Q. In view, then of these letters which you have received through Mr. Graham from Mr. Green, do you say that you prepared these setting plans as directed by the Superintendent of Construction? A. Yes, I took that as his direction.

Q. What? A. What is there in the specifications.

Q. Were there any letters of direction as to setting plans handed to you by Mr. Graham from Mr. Green? A. There is only one that I know of, and that refers to the size of my figures and as to the joints, as to the putting of the joints in.

Q. Were there any that referred to the time of completion of the setting plans? A. No, I don't remember any.

Q. Did you submit to the Superintendent of Construction "not less than one month prior to the commencement of the work on the cutting of the stones they represent" these setting plans? A. I sent them as soon as I could make them.

Q. As soon as you could make them? A. Yes.

(1157) Q. Please let me ask you that question again: Did you submit to the Superintendent of Construction, through Mr. Graham, "not less than one month prior to the commencement of the work on the cutting of the stones they represent" these setting plans? A. I did.

Q. You did? A. Yes.

Q. Was any one else employed by Mr. Graham on the preparation of these setting plans except yourself? A. No, sir.

Q. You have testified that with the exception of the letter of October 20, 1906, all letters written by Mr. Green to Mr. Graham with reference to setting plans were handed to you. Here is a copy of a letter of November 9, 1906, from Mr. Bernard R. Green to Mr. Graham. It says:

"Please work up as rapidly as possible your setting plans, especially those for the lower part of the work and submit them to me for checking by the architects and my approval." Do you recollect ever receiving that letter from Mr. Graham?

The WITNESS: Let me look at the letter.

Mr. HILL: Have you the original letter, gentlemen?

Mr. HARLEY: What is the date of that?

Mr. HILL: November 9, 1906.

The WITNESS: Yes, sir, I got that.

Q. Did you follow the directions of the Superintendent of Construction contained in that letter, to work up as rapidly as possible your setting plans? A. I did.

Q. Now, that was November 9, 1906. Here is a letter of November 21, 1906, from Mr. Green to Mr. Graham. This letter says: "please let me know right away what progress you (1158) have made on the setting plans for the south pavilion granite work for the National Museum building, and how soon you will have any important portion of them ready to submit for approval." Was that letter handed to you by Mr. Graham? A. I don't remember that letter.

Q. You do not remember it? A. No.

Q. Then, do you wish to qualify your statement that you received all the letters with reference to the setting plans by adding this letter also?

The WITNESS: Can I see the original letter?

Mr. HILL: Have you that, Mr. Harley?

Mr. HARLEY: No, sir; we have not.

Mr. HILL: We haven't it either.

Q. Did Mr. Graham ever hand you that letter as a matter of fact? A. I don't know.

(Said letter of November 21, 1906, has been heretofore (1159) inserted in the record.)

Q. I have a letter here of December 1, 1906, from Mr. Green to Mr. Graham. This letter reads as follows:

"As soon as the new tracing is thus ready send it over here for the architect to examine and to insert themselves, in ink, the few dimensions that may be wanting or to correct in ink, any that may be wrong. In this way we will lose very much less time in getting the drawings, which we have been sadly waiting for, ready for the quarrying and cutting work. The contract was signed October 21, last, and we have been waiting for the completion and approval of the setting plans ever since." Did you ever see that letter?

(This letter has been heretofore inserted in the record.)

Q. You did see that letter? A. Yes, sir; and I thought Mr. Green was crazy when he wrote it.

Q. You thought Mr. Green was crazy when *we* wrote it? A. Yes, sir.

Q. Why? A. Because he wanted them in less than five weeks.

Q. And you thought Mr. Green was crazy because he required them in that time? A. Yes.

Q. Specification No. 9 says this: "These plans shall be tracings at $\frac{1}{4}$ inch to the foot scale, prepared, lettered and numbered as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of the work of the cutting of the stones (1160) they represent to give ample time for examination and approval. The setting plans for the lower courses of the

basement story. (The first courses to be cut) shall be prepared and submitted immediately after execution of the contract." Now, when you received this letter from Mr. Green complaining that had not been done you thought he was crazy. What was the meaning of that one month? A. That gave them a month's time before they cut the stone.

Q. Before who cut the stone? A. Before Graham got them.

Q. Gave who a month's time? A. Mr. Green, to look the drawings over.

Q. What was your opinion as to the time you were to furnish all those setting plans? A. Well, we thought we could do that in a month, but we were considerably mistaken because there were 28 drawings and it would take more than that going forward and backward by mail.

Q. You say you could not complete all these drawings in one month? A. Certainly not.

Q. If Mr. Graham had employed assistants to assist you, could they then have been completed in a month? A. No, mailing them to and fro from Baltimore to Washington would take that long.

Q. Suppose Mr. Graham had employed 50 architects to assist you in preparing those plans, how long would it have taken to prepare them? A. It would have been like the tower of Babel, there would have been a great deal of confusion.

Q. Could you have gotten any force that would have assisted you in your preparation of completing those setting plans (1161) in a month? A. No.

Q. Would you have made out every one of those setting plans in the first month of that contract and sent them all to Washington for approval and correction? A. No, sir.

Q. You could not have done that? A. No, sir.

Q. Could it have been done in a month and a half? A. Yes, sir.

Q. Then, am I to understand that with proper assistance you, as the architect making the setting plans, could have prepared all these setting plans in a month and a half? A. I could have prepared them, but I would not guarantee that they would be correct. We made them in the only safe way possible, that is having each one approved before you begin with the next one.

Q. But you say they could have been made if you had proper assistants in a month and a half and sent to Washington for approval and correction? A. I didn't say anything about proper assistance.

Q. Well, I say it; couldn't you have gotten assistance? A. Yes, sir, but they would have been no good—

Q. Didn't you need them? A. No, they were sent off soon enough.

Q. Let me read you section 9 of the specifications again.

(Reading): "The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at one-quarter-inch to the foot scale $9\frac{1}{2}''=1'$, prepared, lettered and numbered as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of the work (1162) on the cutting of the stones they represent, to give ample time for examination and approval. The setting plans for the lower courses of the basement story (the first course to be cut) must be prepared and submitted immediately after the execution of the contract." Now, when the Superintendent of Construction wrote you and directed the hurrying up of those plans, did you consider that he had a right to do that? A. Yes, sir; I considered that he had the right.

Q. Well, why didn't you do it? A. Because it was impossible to do it.

Q. Will you state to the jury whether you could have prepared them with any amount of assistance? A. No, sir.

Q. Suppose you had had all the assistance that you considered; all that was necessary to aid you in preparing the setting plans then how long would that have taken you to prepare the first draft of the complete setting plans? A. A month or six weeks.

Q. Did you prepare a complete draft of the setting plans in a month or six weeks? A. No.

Q. Why not? A. Because it was impossible waiting for the different information and all, and it was necessary to have one plan approved before we could go on with the next.

Q. Suppose you had the proper assistance? A. I could have made them from the drawings, but I don't know whether they would have been correct.

Q. Was it not the business of the office in Washington to correct them? A. Yes, but they would have had great expense for nothing.

Q. But if you had had proper assistance you could have made full and complete sets of those settings plans in a month (1163) and a half? A. It could have been done, but it would have been foolish to have done it.

Q. Then you did not do it because you thought Mr. Green's directions were foolish? A. I did not say that, but it was not the right thing to do.

Q. On June 29, 1907, it is already in evidence, that Mr. Green wrote to Mr. Graham referring to the Thompson-Star-

rett Company: "That company has written urging the sending the remainder of the setting plans as soon as possible. I had supposed that you had made considerable progress in the preparation of these plans, but am disappointed to hear today from Mr. Pirie that he thinks you have suspended work on these plans for some time past." Did you see this letter? A. Yes, sir.

Q. Why had you suspended work? A. Because we could not get the information on No. 7 that was necessary.

Q. Did you explain that to Mr. Pirie? A. I don't remember whether I explained it to Mr. Pirie or not.

Q. Did Mr. Pirie have any conversation with you with reference to these setting plans? A. On several occasions, yes; I don't remember any particular ones.

Q. It is already in evidence that on July 25, Mr. Green wrote to Mr. Graham and said in his letter as follows: "Now, I have a letter from the Thompson-Starrett Company in the same vein as the above. They say that 'the fact that we have very few sizes in the quarry is reducing our output on this order very greatly. The summer is more than half gone and (1164) the quarry, for want of sizes, is running *is running* about half capacity. We believe that there is going to be severe complaint later on, on the score of our failure to deliver stone to Mr. Graham and hope that you can do something to supply us with the sizes for the remainder of the work'." Mr. Green adds, "When will you have another plan ready for approval?" Now, when did you have another plan, ready, do you know? A. That will show (indicating).

Q. Was that letter handed to you, the letter of July 25? A. I don't remember.

Q. It is already in evidence that on August 21, 1907, Mr. Green wrote to Mr. Graham: "Please let me know immediately when the next sheets will come and when you will complete the whole set. They ought to be done by the beginning of next month, and, if necessary, you ought to put more force on the work." Was it necessary to put more men on the work at that time A. No, sir; I could have gotten them out quick enough if I had had sufficient information.

Q. What information did you lack? Mr. Green puts in an implied direction that if you had not enough men on the work he should put more on. Now, you say you did not need more men but that you could have gotten the work out if you had had the information required. What information was necessary? Look at this letter and say what information was necessary for you to complete the rest of the setting plans? A. I find nothing there.

Q. Well, there are the setting plans, please look at them and state what information was necessary to you to enable

you to complete the rest of the setting plans. There are the plans, will you please look at them?

(The witness then referred to the setting plans.)

(1165) A. I cannot remember; I cannot place it.

Mr. HILL: Read that question again, Mr. Weinberg.

(Question referred to was then read by the stenographer.)

A. I cannot remember, sir.

Q. I again ask you if you can give the information that was asked by looking at the setting plans? A. I don't remember.

Q. Can you find out the information referred to by looking at those setting plans? A. No, I cannot.

Q. It is already in evidence that on September 27, 1907, Mr. Green wrote to Mr. Graham: "I am still awaiting your reply to my last letter as to progress on making the remaining setting plans for the work". Was that letter handed to you by Mr. Graham? Here is a copy of the letter? A. Yes, I received that letter.

Q. Can you tell me what progress was thereafter made upon the setting plans? A. I believe there was a promise made to get them through by such a time and it was done with the exception of the drum of the dome.

Q. Did you make Mr. Pirie a promise that you would have all the setting plans completed at a certain period? A. I believe there was a promise made.

Q. And did you afterward tell Mr. Pirie that you had been mistaken—he used a stronger word— when you said that, and that Mr. Graham afterwards took you off and put you on other work? A. I don't think so—

Q. Well, what other work did you do for Mr. Graham? A. I did other work, but I cannot remember what it was.

Q. Did you do any other work on any setting plans for Mr. (1166) Graham on work which he was engaged on in Annapolis, on the chapel for the Naval Academy? A. The Chapel was finished before this was done.

Q. Did you do any work on the approaches to the Chapel for Mr. Graham. A. I did some work on the terrace, yes.

Q. Was that done by you during the time of this contract with the Government? A. I cannot say, but it was done by me.

Q. Do you recollect a contract which Mr. Graham had for doing certain work on the Bradley Mansion in Washington? A. No, I cannot remember that.

Q. Now, Malmati was the contractor, do you remember? A. It was on a flight of steps.

Q. Did you do any work on that? A. There was a flight of steps there—

Q. Well, did you do any work for him on that Malmati contract? A. I don't know; it was for some similar work. It was a little bit of work in Washington, a flight of steps, I believe.

Q. I now hand you setting plan No. 2; was that prepared by you? A. Yes, sir.

Q. There appear on here 6 little drawings; what are they? A. They are the drums of the columns.

Q. Do those six placed together make one or more columns? A. They make one column.

Q. Then there is one column only shown on this drawing? A. Yes, sir.

Q. How many columns were there in the south portico? A. Eight.

Q. Were they all alike or different? A. All alike.

(1167) Q. And that shows one column? A. Yes, sir.

Q. I hand you supplementary drawing to setting plan No. 2 showing the method for marking the stones for portico columns for south pavilion and I ask you what relation that has to that drawing? A. Mr. Pirie really made this and asked me to trace it up for him and letter it.

Q. Mr. Pirie really made that? A. Yes, sir; and I traced it up.

Q. Why did you do that? A. At his request.

Q. What for? A. To show the position of the columns and the grade of the stone.

Q. Had Mr. Graham anything to do with that? A. No.

Q. You have testified that for forty years you have been an architect and are conversant with building and stone cutting method. Do you consider yourself an expert in preparing setting plans? A. I do.

Q. Do you consider the preparation of setting plans for stone cutters the work of an architect? A. It is more of a draftsman's work.

Q. I hand you herewith a sketch prepared by Mr. Harris at the table here a few minutes ago, he is one of the architects who prepared these plans for this building, showing the sort of setting plans which he testified was the one generally in use according to his experience. You heard his testimony, did

(1168) you not? A. Yes, sir.

Q. Kindly look at this drawing and tell me if that does not show everything which you have shown at this setting plan and if it does not show it in a much more deep and com-

prehensive manner? A. This is an attached piece of work which shows for itself—

Q. I ask you does this pencil sketch show everything that appears on there (indicating)? A. It does.

Mr. HILL: I will ask the jury to look at these and compare them.

(Papers referred to were then shown to the jury.)

Q. Would it not be easier to just check for the man who was checking the drawing if he had that pencil sketch instead of the one prepared by you? A. One is as easy as the other.

Q. Wouldn't it have been quicker to prepare that setting plan in this manner than in the manner pursued by you? A. Yes, sir.

Q. Then, it would have taken less time to prepare them. Here is Plaintiff's Exhibit No. 4, a photograph of the south pavilion of the National Museum building. Kindly look at that photograph. Am I correct in understanding that you say that the reason why you had delayed the preparation of all the plans after No. 7 setting plan was because No. 7 setting plan was necessary to be corrected before you could proceed with the remaining setting plans in that building? A. No. 8—

Q. I thought you said No. 7? Look at the plans? A. We had a long wait on this.

Q. Well, did any of the succeeding setting plans depend for their preparation by you upon the approval of No. 7? A. Yes.

Q. You say, then that the setting plan subsequent to No. (1169) 7 depended upon No. 7; how many were there that so depended? A. Well, the next course.

Q. Is that more than one course? A That all depends on that course.

Q. Could you prepare any succeeding courses to No. 7 until No. 7 was approved? A. You could not do it safely.

Q. Please explain what you mean by safely? A. Well, I could not do it correctly.

Q. What do you mean by correctly? A. This course here is 3 feet 10 high and there was some question about it weight; it runs 4 feet thick and there was a question of putting in one stone and Mr. Green had seen Mr. Graham and had written to him about making a change in that stone and we did not know what way they would change it; they may have put it this way (indicating) and they may have changed the jointing about or they may have gone the other way and have not changed the jointing.

Q. Do you mean that you could not go on with the work at all. A. I did not want to do it twice over; it would have been very likely that it would have to be done over again.

Q. Then you did not go on with the numbers above 7 because you did not want to have to do the work over again, is that right? A. Yes, I did not want to have to do that work, the same work over again.

Q. I hand you setting plan No. 8. Please show where and how if that be the case the stones in No. 8 in any way depend on the stones in No. 7, and please give the course number? A. This (indicating) was changed. This stone was (1170) changed in course W 1 and 2.

Q. In setting plan No. 1? A. 8.

Q. Those were to be changed? A. Yes.

Q. Do they touch No. 7 in any way? A. They rest upon the columns.

Q. Am I right in understanding that the change you refer to was in No. 8 setting plan? A. Yes.

Q. Were there any in No. 7? A. Yes, sir; there were several; I testified to that before.

Q. (Mr. HILL) What change in No. 7 setting plan made necessary any change in No. 8, if any? A. Well, I say we could not go on when we had not had this approved.

Q. I ask you to point out the particulars? A. It is in this course which was changed; this was entirely different from the original drawing.

Q. Let me ask you from setting plans Nos. 7 and 8 to show course Z 2 to the jury? A. There it is—it is course W 1 and 2.

Q. I mean W 1 and 2? A. This is it.

Q. Do they touch anything which is on No. 7? A. No. 7 stops here (indicating) at these caps; the pilaster caps shown on No. 7 are immediately behind these and the very next stone above here was No. 8 and we were waiting for No. 8 for information about that.

Q. You were for information for No. 8 before you prepared No. 7? A. No.

Q. Now, I don't want to confuse you in any way, but I understood you to testify in your examination in chief that (1171) the reason why you did not prepare No. 8 setting plan and the following setting plans was because there was a delay in the approval of No. 7. I ask you if that is the case. Do you understand that question? A. Yes, sir.

Q. Then, please answer it. A. There was a delay in No. 7 because of the size of the pilaster caps being increased which delayed them considerably, a considerable time, and the reason

why we did not go on with the stone above was because we did not have information about it.

Q. I want to know if you were delayed in the preparation of any setting plans after No. 7 because of any delay in changing No. 7?

The WITNESS: What, could I go on with No. 8—

Q. Did the failure to approve No. 7 hold you back in the preparation of No. 8? A. It did.

Q. Then, am I right in understanding you testify that the delay at Washington in the approval of No. 7 setting plan delayed you in the preparation of No. 8? A. It did, because we did not know how to do No. 8.

Q. Am I right in understanding that until No. 7 was finally approved you could not do No. 8? Please answer that question yes or no? A. Oh, we could have done No. 8 if we had known how to do it.

Q. Could you know how to do it until No. 7 was approved? A. We probably did because there was a long while until No. 7 was approved, but there was a long delay on No. 8—

Q. I asked you what caused that? A. Mr. Green saw (1172) Mr. Graham and said he would have to divide that stone in some way and that he would consult with the architect and find out how to do it.

By Mr. HILL:

Q. Was the approval of No. 7 setting plan by Mr. Green necessary before you prepared any subsequent setting plans? A. Yes.

Q. What subsequent setting plans depended in their preparation upon the approval of No. 7; did No. 8 depend on the approval of No. 7? A. Yes.

Q. Why. A. Because as I tried to explain before we did not understand how to make the drawing for the W course.

Q. Then I am right, am I, in understanding you to say that No. 8 would not be prepared until No. 7 was approved? A. If we had instructions about it we could have, but we didn't get final instructions.

Q. Did you ask for instructions? A. Yes.

Q. Can you produce the letters? A. No, sir, because there was a conversation between Mr. Green and Mr. Graham about it, and Mr. Green wrote a letter saying that he would consult with the architects first as to what course to pursue in the matter and to hold it up until we heard from him.

Q. That was in reference to No. 7? A. No, sir, in reference to No. 8.

Q. I think you have misunderstood me. I have asked you whether any drawings depended on the approval of No. 7? A. No. 7 could not be approved until the size of the caps were given.

Q. When did you get the size of the caps? A. I do not (1173) know the date; I can get the dates.

Q. I want this to be perfectly clear to you, as it apparently is not. I have asked you this question in different forms a good many times before and I have not succeeded in getting an answer to it? A. No. 7 was delayed considerably on account of the caps and as I understand your question you asked me why we could not go on about No. 7. I told you it was because we did not know about No. 8 and 8 was the next course.

Q. Am I right in understanding that the delay, if there were a delay, in the approval of No. 7 did not hold up the preparation of any of the subsequent setting plans? A. If we had known about No. 8 it would not have done it.

Q. Why did you have to know about No. 8? A. Because we did not know how to fix the drawing.

Q. Then tell me how it was that No. 8 was approved before No. 7? A. It might have been.

Q. Sir? A. It might have been; there was a long delay before the final approval of No 7.

Q. Take Nos. 7 and 8 and show the jury, if you please, in what particular, if any, No. 8 stones touched No. 7? A. Well, they do not touch No. 7 because they come on the columns away from No. 7 and the No. 7 was under No. 8 and we could not go on with any other course except No. 8.

Q. Here are the two plans. If you want the question read again I will have it read again.

(Question read by the stenographer.)

The WITNESS: I will show it to you on that photograph (indicating).

Q. First, if you please, show it to me on the setting plans? (1174) A. This No. 7 course here (indicating).

Q. Let me hold it for you? A. And this line is the pilaster caps and projecting out from these some distance are the columns right opposite, and it isn't shown on the photograph, but it is the next course above this (indicating).

Q. The next course above this? A. Yes, it is above this and comes out over the columns.

Q. Show me in No. 8, what stones there are that rest on any stones here on No. 7? A. Sir?

Q. I am asking you this: Will you show me in No. 8 any stones that rest on any stones shown in No. 7? A. No. 7 runs through here (indicating) and here is No. 8 that comes out and rests on the column.

Mr. McLANAHAN: It doesn't show a single column?

A. There is no course above No. 7 nearly on the same line.

Mr. HILL: There is no course above No. 7?

A. No, sir, that is, right on the same line.

Mr. McLANAHAN: These stones do not rest on anything shown here (indicating). The columns are not shown here?

A. No, sir.

Mr. HILL: No. 8 doesn't rest on No. 7 at all?

A. No, sir, not on the 7 course, no, sir, but it is the next course we have to prepare.

Q. Now, you have testified that No. 8 held you up. Here is a letter, already in evidence, from Mr. Graham to Mr. Green, in which he says, "Sometime ago I had some conversation with you about changing the architrave stone in cornice over portico columns into two stones." Is that what held you up on No. 8? A. Yes.

Q. That is the conversation you referred to? A. Yes.

(1175) Q. Was there anything else in No 8? Please show the stones on there to which you refer? A. These stones (indicating).

Q. They are the architrave stones? A. Yes.

Q. This letter says "Architrave stone"? was there more than one stone? A. It was the course.

Mr. McLANAHAN: This is right over the top of the column caps (indicating)? A. Yes.

Mr. HILL: Gentlemen, we ask for letter of February 25th, 1907, from Mr. Green to Mr. Graham. Here is a letter of February 25th, 1907 from Mr. Green to Mr. Graham read-

(1176) ing as follows:

BUILDING FOR THE NATIONAL MUSEUM.

Office, Superintendent of Construction,
Library of Congress,

Washington, D. C., February 25, 1907.

Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

I am enclosing herewith a tracing paper full size profile of the architrave or "lintel" stones of the main portico for the National Museum building, showing where a vertical joint may be located dividing the stones in two parallel courses front and rear. This relates only to the 5 lintels between the 6 columns in the front of the portico. The 2 return architraves, one at each end of the portico, will be in single stones, and so will be all of the architrave stones of the interior of the portico behind the front columns. This is partly in answer to your letter of the 13th instant. You will notice that, instead of splitting the architrave into two courses as you suggested, it is really made in one course with a front and rear stone, and the rear stone will be practically the same height as the front stone. Notice that the new joint must be very close and fine.

As to the extension of the main cornice on the two wings, which you asked to be allowed to cut in one course instead of two, I have no objection providing the quarry people will furnish the required stock. This you may perhaps arrange through the Inspector.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction.

Copy of above letter sent to:

William Pirie, Inspector,

Milford Mass.

(1177) Q. Did Mr. Graham hand you this letter when he received it? A. I have no recollection of receiving it.

Q. You have no recollection of having received it? A. No, sir.

Q. That is the information that you wanted, is it not, in reference to No. 8? A. It is what I was referring to if the details came with it.

Q. So Mr. Graham received in February 25th, 1907, the information which you wanted for No. 8 and you did not draw up No. 8 until July 29th, is that correct? A. It is.

RE-DIRECT EXAMINATION.

By Mr. HARLEY:

Q. This (indicating) I believe, had reference to setting plan No. 2? A. Yes.

Q. Will what you have said as to that apply to any other setting plan? A. No, sir, it would not apply to the main walls.

Q. It would not apply to the main walls? A. No, sir, because it is disconnected entirely and it is only one stone in width.

Q. Mr. Mason, from the time of the approval of setting plan No. 1—I believe Nos. 2 and 3 were approved at the same time—was there any time in the progress of this work when you were not more than one month ahead of the cutting work in your setting plans?

Mr. MCLANAHAN: I object to the question unless the witness testifies to what extent the cutting progressed each month. I do not think he knows that, at least he has not tes-
(1178) tified to that fact.

Mr. HARLEY: Can you answer the question?

A. I cannot answer the question because I do not know.

FRANK F. GRAHAM, a witness of full age having been duly sworn testified as follows:

DIRECT EXAMINATION.

By Mr. HARLEY:

Q. You are Mr. Frank F. Graham? A. Yes.
Q. The defendant in this case? A. Yes.
Q. One of the defendants? A. Yes, sir.
Q. You made the contract of October 23rd, 1906, which is already in evidence, did you not? A. I did.

Q. Were you equipped to do the work mentioned in that contract? A. I was equipped to do more than that amount of work before, but I made better arrangements after I got this contract, spent more money and put more machinery in to carry out this contract.

Q. How soon did you do that, Mr. Graham? A. I wasn't more than 30 days or 35 days, or maybe two months, getting ready.

Q. Although Mr. Green had come over and certified on October 19th that the proposal is reasonable and the bidder has facilities for doing the work properly, our understanding is that you went ahead and put in more facilities? A. Yes, to do the work?

Q. What did you do, please? A. I think I put in a hoist-
(1179) ing engine and steam boilers, and different little things around there, a new boiler, extra boiler and machinery.

Q. About how much expense did you go to? A. Four or five thousand dollars.

Q. Do you remember when the stone under this contract, commenced to come in from the quarry? A. I could not say what date it did come in but the freight bill will show you that, I refer you to the freight bills.

Q. The freight bill? A. The first freight bill in that book of ours.

Q. The gentlemen have testified— A. The freight bill shows it.

Q. I believe that shows it (indicating). A. Yes, sir.

Mr. HARLEY: Let me have that letter of February 14th, 1907 and December 18th, 1907, gentlemen?

Q. It has been testified by witnesses on the other side that up to October, 1907 you had received but 10,983 cubic feet of stone. Will you tell the gentlemen of the jury what you were doing all that time between October 23, 1906 and October 1st, 1907? A. I wasn't doing anything, only maybe little odd jobs that would come in. Afterwards, I got a little job at Annapolis and went ahead with it, as far as I could with it.

Q. What yard did you have? A. The yard at Calhoun and the B. & O. Railroad.

Q. Tell these gentlemen about how much of a yard that is? A. I could not tell you exactly. It is 100 feet one way and a whole block through the other way.

Q. 100 feet one way and a whole block the other way? A. It it from Calhoun to Stricker, 100 feet facing on either
(1180) street.

Q. Why is it that you didn't do anything much during the Spring and Summer and early Fall of 1907? A. Because the Government did not furnish me with any stone to do anything with. How could I do anything when I did not have anything to do anything with? When I didn't have anything to work on.

Q. What is the harvest season for the stone cutter? A. The Summer is the best time, and the Spring.

Mr. McLANAHAN: If your Honor please, we move to have that question and answer stricken out on the ground that the contract says nothing about when the stones shall be furnished to Mr. Graham, and it makes no difference when the harvest season is so far as the legal side of the contract is concerned. We have nothing to hide, but we think it is encumbering the record with a lot of irrelevant matter if this goes in.

The COURT: I will allow the question.

(Exception noted.)

Mr. HARLEY: Go ahead and answer the question.

The WITNESS: It is already answered.

(Question and answer read.)

(1181) Q. How about the Fall? A. The Fall is very good too.

Q. How about the winter? A. Most everybody don't do much here in the winter; we never did do much.

Q. Why not? A. On account of the air, and the machines will do 25% less work in the winter than in the summer time.

Q. How about the men? A. The men the same way.

Q. How about the number of good working days in the winter, as compared with the summer, spring and fall?

The WITNESS: Everybody knows you cannot work in the winter the same as in the summer, because there is snow some days, and some days it is raining and some days it is too cold.

Q. What would you say as to cutting less than 11,000 cubic feet of stone between the last day of January and the 1st day of October, 1907, as to the profitableness or otherwise? A. Before I had this contract I had a contract with the National Museum for $120,000 and also had a contract in Annapolis for over $200,000, and many a time I cut over six or seven thousand feet a month. I can show it and prove it.

(1182) Q. You haven't quite *answer* the question.

(Question read to the witness.)

A. There was nothing but a loss to that.

Q. How long have you been in the stone cutting business, Mr. Graham? A. About 26 years.

Q. Have you ever been in any other business? A. Never in my life; only a stone cutter by trade, and I served my time at the business.

Q. Where? A. In Richmond, under my father on the Philadelphia Post Office. They put up a part of the Philadelphia Post Office.

Q. Do you know what, according to the usages of your trade, is meant by random stone? A. Random stone is any stone that you can drill into and make two stones out of, two or three stones. That is what a random stone is.

Q. Do you know what is meant, under the usages of your trade by dimension blocks, or dimension stones? A. Dimension stone is stone ordered to sizes from your plans, whatever they are, that is called dimension stone, sizes that is given to the quarry.

Q. Do you know what is meant, in the usage of your trade, by the term "net dimension block?" A. Net dimension block can only be one thing, and that is either a solid block or a cut blocks. If I had to sign a specification by the Government that way, they would expect me to cut the block, or they would expect anybody else to do it.

Q. What would there be for a stone cutter to do on that? A. To trim that block out and bush it up, put the moulding through and cut it in shape, but the net block would have to be to the size so you could cut the stone out of the sizes that are (1183) that are given on those approved course plans.

Mr. HARLEY: I would have the original of letter of February 14th and the chart which was annexed to it. It is in evidence.

Mr. HILL: We have a copy of a letter here but my brother wants the original.

Mr. HARLEY: Mr. Graham, here is a letter dated December 18th, addressed to Mr. Bernard R. Green. Look at it and see—

Mr. HILL: What year is that?

Mr. HARLEY: 1907, if you please, sir.

(1184)

F. F. GRAHAM,

Calhoun Street & B. & O. R. R.

Baltimore, Dec. 18, 1907.

Mr. Bernard R. Green,

Supt. Const. Nat. Mus.

Dear Sir:

Enclosed please find a bill for extra freight and roughing out on the 65 enclosed cars of rough stock.

I am willing to pay the freight on anything not exceeding 40 cts. a cu. ft. but am not willing to go higher than that.

If you will look into the bill you will find I have charged up these extras viz: I averaged a number of cars on which the freight stood at 40 cts. cu. ft. and find that the average wt. would be 206 lbs. to 1 cu. ft.

On the bill to make it as plain as possible, I give:

1. The date car was shipped from quarry
2. " car and number
3. " number of lbs. wt. on car
7. " " " cu. ft. on car
4. " Lbs. in 1 cu. ft. on car
5. " Average lbs. 1 cu. ft. @ 40¢
6. " Surplus lbs. in 1 " " on car.

Multiply the surplus in 1 cu. ft. by the number of cu. ft. and you get the overweight due me, which if multiplied by 40¢ will give me the extra freight on car. Then allowing myself 25¢ a cu. ft. for roughing out this excess weight, I multiply 25¢ a cu. ft. by number of cu. ft. and this gives me pay for roughing out.

This will give me for extra freight,	$874.40
Roughing out,	546.50
	$1,420.90

I also give a list of cars on which freight ran under 40 cts. and 40 cts. even.

Respct. yours,

F. F. GRAHAM.

(1185) Q. Do you remember the letter? A. I remember something of the letter.

Q. It emanated from your office? A. It came from Miss Cole; she wrote the letter.

Q. Did you instruct her to write it? A. There may be some things in there that I did not, but the letter I had it sent.

Q. In the main you ordered the letter— A. —wrote.

Q. Written? A. Written.

Q. Who made up this (indicating)? A. Miss Cole did the same thing with that.

Q. That is Mrs. McNeal now, is it now? A. Yes.

Q. Look at that? A. I haven't my glasses, I do not know about what it is. What is it? I remember going over the work.

Q. I want to see whether these quarried feet on cars are actual cube or what, do you know, or will I have to compare them with Mr. Pirie's— A. I do not know, you compare them.

Q. Now, the first car you have 333.2 and Mr. Pirie has it in quarry cube 343? A. The freight bill will give you that, or the correct bill from the quarry.

Q. On the 2nd you have 258.4 and Mr. Pirie has 258? Now, in the third one Mr. Pirie has it in quarry cube 268.2, and you have it 268.9, and on the fourth car you have it as 221.5 and Mr. Pirie has it 221.5 quarry cube. The next one you have 178.4, and Mr. Pirie has it 178.4 quarry cube, and the next one 213.6 and Mr. Pirie has it 213.6 quarry cube, so that these cubes must have been the quarry cubes, is that correct? A. I think they must have been; we took them off the cars.

Q. Do you know where you got the cubes from? A. You mean the rough cube or the dimension cubes off the drawings?

(1186) Q. Yes? A. We took the dimension size off the approved drawings.

Q. Where did you get the sum of the cubic feet? A. You mean the excess of feet?

Q. No. Now, the seventh one you have 189.1, and Mr. Pirie has it 189.1 quarry cube? A. You mean those cars going away?

Q. I mean those cars coming in? A. Yes.

Q. The cars coming in? Mr. Pirie has it 210 quarry cube and you have it 217.9—No, I beg your pardon, each of them is 217.9, so that these cubes must be the quarry cube? A. They were made up between Mr. Pirie and Miss Cole there; they made them up together, and they ought to be the same. There wasn't anything that went out of that office that they did not consult each other.

Q. What have you to say then as to the allowances which you placed on there of 206 pounds per foot for quarry cube? A. Quarry cube of stone would run about 200 or 206, maybe a little bit more per foot. I mean dimension cube.

Q. That is as to dimension? A. Yes.

Q. How ought it to run, if you know, in net dimension? A. In net dimension it is perfect. It is either a sawed block or a cut block. Everybody knows what a net dimension block is, it is either cut or sawed.

Q. Now, Mr. Graham, another letter has been read in evidence with the same signature to it. I will read it to you and see whether you have any recollection of it.

(Letter of February 14th, 1907, from Frank F. Graham to Bernard R. Green read.)

Have you any recollection of that letter? A. I have a (1187) recollection of it; Miss Cole wrote that, I believe.

Q. I beg your pardon? A. Miss Cole wrote that, I believe.

Q. Do you know what instructions you gave her about writing the letter? A. That was founded on quarry dimension block.

Q. Dimension block? A. Dimension block. I did not say anything to Mr. Green about a net dimension block; it was a quarry dimension block, a block quarried to dimensions.

Q. Was that first load even dimension block? A. It was a random stone. Mr. Pirie told me himself that they must have rolled it off the hill, some of them boulders.

Q. What did you have to do with it? A. The first thing we had to do was to drill them to sizes so the stone cutter could work and cut one of them. You can see that in Mr. Pirie's letter where he wrote Mr. Green, and it was rotten with it.

Q. What do you mean by rough stone, Mr. Graham? A. I mean any stone is a random stone that you have to take a driller and drill another stone off of that and make some other stone, may be for a building, and if not for that, make it for another purpose, for some purpose I may have for that.

Net dimension block is a stone—dimension block is a stone quarried to sizes that is sent to the quarry. What is that other?—and a net block is a perfect block and it has either got to be sawed block or a cut block. It is sent to my yard that way so can I bush it up and put the moulding on the same as marble or soft stone. If you order a net block they take that stone in the yard and as long as the net sizes (1188) there they get any size of stone a moulded stone, or even a piece of ashlar, you can cut any stone out of a net block

of stone. It has got to be net with no corners off or anything else.

Q. Was any of this stone that has been testified as having been received at your yard in net dimension block? A. There was never a stone come into my yard according to the specifications, that Mr. Green wrote in them specifications—

The WITNESS: What is the idea of putting an item in that—

Q. Mr. Graham, was any of the stone dimension block that you received on this job? A. Under the head of net dimension block, there never was, but there was some dimension block.

Q. There was some dimension block? A. Yes, there was some dimension block.

Q. What was the character of the stone that you received on this job from the quarry in Bethel, Vermont? Explain to the jury. A. Some of the stone that came in we had to put a face on, all the faces were off, and there would be big holes come in them. Mr. Pirie would come around and see them and say they would have to be lowered. After it was lowered he said we will just change this and put it back where it can't be seen, as it won't do to go in alongside of the door. It is an imperfect stone and we have to shift it around a little and he wrote Mr. Green the same thing.

Q. About what proportion of the stone, if you can say, was dimension block? A. Any stone that came in that I did not have to do drilling on to shape it up.

Q. About what proportion? A. I could not tell you that; here was a great many that was not dimension block that I had (1189) to put a driller on and shape them up before the stone cutter could work on them.

Q. One of the witnesses testified that you had laborers to do that work because it was cheaper than having stone cutters? A. That is not a stone cutters work, it is a quarryman's work. I had to put a man on the same as a driller they used in the quarry. Mr. Pirie knows that as I called his attention to it, and I even brought Mr. Green over and showed him the line on a stone that would make two stones and I asked him what I would get for that and he shook his head and didn't say a word. That was the same way with Mr. Pirie.

Q. What do you mean by lining up? A. Lining up for the machine, to put under the machine, to surface it off.

Q. How much of this drilling became necessary by reason of the size of the block? A. Every car had some drilling on it. The man had to put a line on the stone and drill it with the drillers. The stone cutters don't allow a driller to

drill on a stone that belongs to them, but if it belongs to the quarry the stone cutter allows it. If it is their stone they allow it to be done by themselves but not by the drillers, and as I said if it is their stone we are not allowed to do it. That is according to their Union. But where there is a line to be drilled they cannot object to it as we have to put it in shape for them to cut.

Q. How is it drilled? A. On a straight line.

Q. By what? A. By a man with an air drill.

(1190) Q. With an air drill, that is what I want you to explain? A. With an air drill, yes.

Q. And it left some fragments of stone, did it not? A. Yes, it leaves a big lump, and they have to be plugged by the stone cutter after it comes to the yards, but as a general thing it is the quarryman's job. Mr. Pirie wrote to Mr. Green about the plugging of those lumps off.

Q. Just as Mr. Pirie said in a letter? A. Yes.

Q. What became of the parts of the stone that you plugged off? A. Well, they were throwed out in a pile and hauled away. There is a couple of car loads of odds and ends in the yard drilled off these dimension blocks as they call them.

Q. Of the same color, Bethel granite? A. Yes, nobody ever had any Bethel granite but me around here.

Q. You are the only one? A. Yes.

Mr. HARLEY: Your Honor, we would like to make an arrangement with the other side, by which the jury, with the consent of your Honor, after hours can look at that granite.

The COURT: I hardly think it is necessary.

Q. About how much is there now? A. I took two or three people up there, Mr. Perry, and a couple other gentlemen and they told me—

Mr. MCLANAHAN: I object to what they told you.

Mr. HARLEY: How much do you think there is? A. Two car loads.

(1191) Q. How much has been hauled away? A. I could not tell you that. They were hauling it away all the time. The place would have been blocked up if they hadn't.

Q. Did you ever complain of the character of this stone to anybody? A. All the time to Mr. Pirie. About it coming in rotten and big blocks being over size.

Q. Over size and rotten? A. Yes.

Q. How much of it was rotten? A. I could not tell you that but there was a good bit of it that I considered rotten, I could not say how much but a good deal of it.

Q. About how much? A. I could not say about how many but there was many a car.

Q. Many a car that was rotten? A. Yes. I wasn't fit for anything. No architect in Baltimore would have turned the stone out such as Perry and Baldwin & Pennington, or any of them kind of people would not have allowed it to go in the building.

Q. How long did those extra sizes keep up? A. They continued right along. You can see from the book that they did because I gave them orders to measure each side; I told them to measure exactly all what was on the car and carry them to Miss Cole and put them on the book and she did it.

Q. That continued up to what time? A. Late in the Fall some time, I do not know.

Q. Who made those entries? A. Miss Cole stated here that she did. She did.

Q. Was it done in the usual course of business? A. Yes.

Q. Whenever a car come in? A. Yes.

(1192) Mr. HARLEY: With your Honor's permission, we offer in evidence this book.

(Objected to.) (Objection sustained.)

To the admissibility in evidence of said book of original entry showing dimensions of all stones received by the defendant Graham from the plaintiff the plaintiff then and there objected; and the court sustained the said objection and refused to admit said book of original entry in evidence.

(Exceptions noted on behalf of both defendants.)

To which action of the court in sustaining the objection of the said plaintiff to the admissibility in evidence of said book of original entry showing dimensions of all stones received by the defendant Graham from the plaintiff and in refusing to admit said book of original entry as evidence the defendants and each of them then and there excepted, and prayed the court to sign and seal this, their thirty-fourth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS. [Seal]

Thirty-fifth Bill of Exceptions.

After the matters set forth in the defendants' aforegoing bills of exception all of which are hereby incorporated in and made a part of this, their thirty-fifth bill of exceptions, at the

trial of this case, the defendants, to prove the issues on their part offered and produced evidence as follows:

Q. How was the stone during the winter of 1907, and
(1193) 1908? A. What do you mean?

Q. Was it rough or otherwise? A. It did come in sometimes a little better and then sometimes it would just drop back to the same old way. The freight on the cars will tell you that. All you have to do is to look and see how the freight compared with the stone that is on the car.

Q. You kept on working until the early part of March, how was it about that time? A. I think it began to come in—they sent all the large stone in at one time.

Q. What do you mean by large stone? A. The largest stone in the building.

Q. How was it? A. All you got to do is to take the freight bills and the size of the dimension of the stone that was on the car, and it will show you just as much rough on that as any other stone.

Q. How was the stone generally, which was in your yard and on the cars, in March, 1908? A. Just about the average right along.

Q. What do you mean by the average? A. I mean the blocks were just as rough then as any other time. The freight bills will show that.

Q. Explain how rough it was, please. A. I know that there was one cap that come in there that we come pretty nigh breaking the derrick down, we had to life one end and then the other end up, and I think that was a third larger than it ought to have been.

Q. What have you to say as to the cost of cutting that stone? A. The more you put on a stone the more it costs to cuit it.

(1194) Q. Just tell us that a little louder. A. I say the more stone there is to a dimension block, the diagram, the larger the stone is for you to cut that stone out of it puts more work on you, and it gives you double the work by making a stone that much larger than you would have to have a stone to cut a stone of a certain size out of it. It takes just as long if there is an inch to take off to take that inch off as it does if you were taking 8″ off, and in that case it would take six times as long to rough it down with the surface machine.

Q. In other words, it takes six times as long to take 6″ off as it would to take 1″ off? A. Yes. If it was 5″, it would take five times as much as 1″, and there was many a face there that we took 5 or 6″ off the first part. Mr. Pirie was there and saw it done because I drew his attention to it.

Q. Now, what would you have to say as to freight on stones of that kind? A. Oh, I don't know; I reckon them cars would average about ten or fifteen dollars a car more by having that excess freight on there on dimension block as they call it, and the freight would only have been about 165 pounds to the foot, if there would have been net dimension block. You can count that up yourself.

Q. There was an excess in your judgment of ten or fifteen dollars per car over dimension block? A. Yes.

Q. And 165 cars, you would say, was how much? A. At $10.00?

Q. It would be $650.00? A. Yes.

Q. And $15.00 would be 50% more? A. Yes.

(1195) Q. And that applies to dimension block? A. Yes.

Q. You are making the dimension block the Standard when you refer to that excess? A. Yes.

Q. Suppose it was net dimension? A. It would only be freight on 165 pounds to the foot. Net dimension is 165 pounds, which the specifications called for. They let me off that way anyway.

Q. Now, when did the stone commence to come in heavy? A. Oh, in the fall some time; I do not know what month.

Q. It is noted that in October you got out 3,470 feet, in November 4,852 feet, and then in December, 3,883 feet. Did you have as many men employed then— A. About as many, I reckon. I could not tell you about that. Miss Cole knowed more about that than I did. The books got away from there somehow or other.

Q. What do you mean by that? A. There were only two or three books that I carried down to Harry Scherf's office and the rest were taken away by someone. Miss Cole, I reckon, can tell you how many cars were in.

Q. According to their testimony less than 11,000 cubic feet came in before October, and along in October 5,993 plus, and then in the next three months nearly 20,000 feet. Now, can you handle that in the winter time? A. Not when they close my place up with stone. They piled stone every place where the stone cutter could set.

Mr. McLANAHAN: I object to that, as I would like to know who "they" are, and how they piled up that stone?

The WITNESS: I mean the Government.

Mr. McLANAHAN: All right, the Government piled his place up with stone. I want to find out how they piled it up when he had charge of the transportation, paid the freight, and

(1196) and attending to the getting of the cars, and the bringing of the stone down here from the quarry? A. I mean then—

The COURT: You mean the stone came there? A. Yes.

Mr. HARLEY: Did you control its coming in any way, whatsoever? A. I could not stop it; it came there and there was no way in the world for me to stop it. I had to pay demurrage and keep on unloading it until the yards were full, chock-a-block, and there was no place *of* the men to work, and only place for a few men. We cut all the little stone and got them out of the way when the big stone came in and we couldn't get one stone over the other with the facilities we had.

Q. Did you ever complain to Mr. Pirie or to Mr. Green about the late arrival, of this stone? A. I think I spoke to Mr. Pirie.

Q. Did you ever speak to Mr. Green about the delay in the delivery of this stone? A. I complained to him about it but there was no use—nobody seemed to care—seemed like disinterested all together in everything.

Q. Did you make any suggestion to Mr. Green about it? A. I went over to see Mr. Green about the start of the job, and I tried to get him to change the job into Mr. Airy, as I said that I would finish the job on time if he did that and finish it up right.

Q. Why did you try to get him to do that? A. Because there was no stone and my business was shut down with nothing to do and my expenses went on the same as if I had had a lot of men on.

Q. Your expenses went on just the same? A. The same expenses went along as if I had had 100 or 200 men working. (1197) I had to keep the same people there—we never had any more expenses when we were doing this work at Annapolis or on the Museum before. The Inspectors generally run the stone cutting end. You have to satisfy the Inspector. All our foreman had to do was to put the stone in place and give the stone cutter the diagram and after it was finished the stone was turned over to the Inspector and he O. K'd it and it is boxed and shipped to Washington.

Q. Did you ever try to get Mr. Green to allow you for what you called the extra quarrying work or extra freight? A. I did but he never paid me a cent for it. He told me that he couldn't do it the same as he did on the last bill on the last contract I sent him for extra. He said the contract is closed, I know we owe you this money but we cannot pay it. It was a little over $200.00. Mr. what's his name, was there and he can tell you the same thing.

Mr. McLANAHAN: You are not referring to this contract now? A. No, sir, the old contract.

Mr. HARLEY: Do you remember writing a letter on or about February 10th, 1908, to Mr. Green "relative to your letter of the 7th inst., etc,." as follows:

(Letter of February 10th, 1908, to Bernard R. Green, from Frank F. Graham read. This letter has already been offered in evidence.)

Do you remember writing that letter? A. I remember telling Miss Cole to write it.

Q. You remember telling her to write it? A. Yes.

Q. There has been some testimony about Graham stock. Will you explain to the jury what is meant by that? A. Gra-
(1198) ham stock is stone that we slabbed off this good dimensoin block that come in from the quarry and cut other stone out of it that went in the National Museum building, and they were sent on the invoice over there as Graham stock.

Q. Who sent them as Graham stock? A. Mr. Pirie O. K'd them and sent them. He gave me that stock because I forged them off the pattern and he said I would be paid for it.

Q. That was the waste stone? A. Yes.

Q. Were you to be paid for that so called Graham stock? A. He said I was.

Q. Were you ever paid? A. I do not think so.

Q. Don't you know as a matter of fact, that you were not? A. I was paid for the cutting; I do not think they ever allowed me anything for the stock at all.

Q. Never allowed you anything for the stock? A. He claimed the stock was mine because I went to the trouble of drilling off this good dimension block a big slab which made another stone and he called that my stock.

The COURT: You were to be paid the quarry price?

A. He said he was going to pay me that.

Q. They did not refuse to pay you for the cutting? A. That was paid for as the work went on.

Q. Was it understood that he should pay for that stone as if it was finished from the quarry in the rough? A. That is some of the stone that is drilled off the good quarried stone they are speaking of. It was a great big slab that we cut off and made other stones out of. That is quarrying the stones, that isn't stone cutting at all

(1199) Mr. HARLEY: It has been testified that you cut in actual cube a little over 27,500 feet. Now, are you familiar with that whole work? A. I am familiar with it in my line of getting the work out. I paid people to make the drawings and diagrams and things of that kind.

Q. Are you able to say whether or not the work you did was a fair average of the whole work done on pavilion C? A. It is a fair average from what it would have been if the stone had come in net dimension block because the work that I did before I put double the work on every stone on account of the roughness of the stone.

Q. Taking into consideration merely the stone and the location, is the work that you did a fair average of the whole work done on that pavilion C? A. Part of it was an average. A little of it was a cheaper class but that did not amoun to anything.

Q. How could it average up? A. But the cheap class of work if you took and put it under the machine and ground it down to get them faces and then they would have to go down again after the stone was bushed up, and removed and do extra work on it, it made it cost just as much as any moulded stone I cut in the building, because when we were cutting the stone the worst patterns were coming in about that time.

Q. You employed Mr. Mason to do the setting plans, did you not? A. Yes, he made the drawings for the building. He made the setting plans for the other contract I had with the National Museum and there was never no fault found with his work in the setting plan.

Q. Can you say whether or not the setting plans on this job were, or were not, in the hands of the Government more (1200) than one month before the cutting work was going on? A. Certainly.

Mr. MCLANAHAN: Before the cutting work began.

Mr. HARLEY: On the cutting of the stones they represent —in other words, were you not always more than a month ahead of the work? A. All the time.

Q. With the setting plans? A. Yes, we had certain plans up there up to the specified time. You can read the specifications. We furnished that amount of setting plans.

Q. Now, while you were idling in the Spring of 1907, waiting for this stone, do you know where Mr. Green was? A. Someone told me he went to Europe—

Q. Don't you know? A. Mr. Sheehy over there told me—

Q. What was going on at your yard during this time? A. I do not think many things was going on; there was nothing to go on with in the Government line.

Q. You have stated in your letter of February 10, 1908, that you had to take on a $25,000 contract to keep the work going? A. It may not have been that much but may have been more or less.

Q. When did you have to take that on? A. I could not tell you that.

Q. You do not know what month? A. I do not what month; if I had my books I could tell you.

Q. I beg your pardon? A. I say if I had my books I could tell you but when I went down there after we started up again I had no books only the books I carried to Mr. Scherf's (1201) office.

Q. At the time you took on the extra work, how much stone did you have to work on for the Government? A. There was very little.

A. There could not have been much as I certainly would not have wanted to get another job. I was so anxious to do that work and tried to do it because I knew there was a good profit in it if I was sent the stone according to specifications. I told them right along that I calculated I would make 25 to $40,000 on the job, the way I was equipped with machinery to do a job of that kind. I always made money before and I could have made money on that job.

Q. Look at this photograph No. 1, do you remember that? A. I remember it being in the yard.

Q. And No. 2? A. Yes, I remember them stones

Q. Where was that piled up? A. It looks to me like it was piled up under the big derrick.

Q. Now, No. 3? A. They were piled up under the big derrick and all around the shed so we could hardly get anything else in the shed.

Q. And No. 4? A. Those are them big stones that was underneath the derrick that we had to roll off of the stone that turned the big 20-ton derrick of the B. & O. over.

Q. Why did it do that? A. The weight was there, I guess.

Mr. McLANAHAN: How do you know that?

A. My brother was there and he told me and Mr. Carson and him were unloading the stone. They had the contract.

Mr. McLANAHAN: I ask that the answer be stricken out.

(Motion granted.)

Q. You saw the stone yourself, though? A. Yes.

(1202) Q. How did it compare with the real dimensions of the stone it was to be cut out of? A. My brother said it was 1′ 6″—

Q. Could you tell that yourself? A. I could not tell.

Q. What is No. 5? A. That is one of them caps, I think.

Q. One of the caps? A. A cap or a piece of a cornice or something like that. It was a stone under the shed, near finished.

Q. Now, No. 6? A. This is a lot more of rough stone piled under the derrick so you could not move. This is all big stone and had to pile them around to get them off.

Q. That was outside of the yard ready for shipment? A. No, this is the rough stone which was piled up between the railroad, you see, around the big derrick on the B. & O. ground. We had to take in part of that place.

Q. Now, No. 7, where was that? A. This stone was next to the shed and under the big derrick.

Q. Next to the shed there, under the big derrick? A. Yes.

Q. And this (indicating)? A. They are all under the big derrick.

Q. Where they were piled up there? A. Yes.

Q. What room did you have to work in with all those stones around you? A. Very little room left to work in, we worked two or three men on one stone.

Q. Why did you have to work two or three men on one stone? A. To try to get them finished to get them out of our (1203) way so we would have room for others. I think we worked four men on them caps.

Mr. A. Pearre: The Merchants' Transfer and Storage Company has received from Frank F. Graham $500 in settlement of their claim, and we ask that judgment be entered satisfied. We withdraw as an intervening party plaintiff.

Mr. Hill: We have no objection, your Honor.

Q. (Mr. Harley) Mr. Graham, look at the diagram in the back of this book, which is marked C-10, June 17, 1907; have you seen that diagram before? A. I have.

Q. At the time C-10 came in the yard did you notice the stone? A. Noticed the stone and the diagram was made from the stone.

Q. Now, as to the measurements, you are not posted with substantial accuracy? A. No, sir.

Q. Do you know when the diagram was made? A. Right after the stone came in.

Q. Do you know who made it? A. No, sir.

Q. You saw it, though? A. You saw the stone too?
A. Yes, sir.
Q. Will you tell the jury whether or not that diagram substantially represents the measurement of the stone out of which C-10 was to be cut? A. That is the size of the stone as it (1204) came in.

Mr. HILL: I object to the word "substantially."

Mr. HARLEY: I believe that there is a mistake of an inch or two.

Mr. HILL: One of the witnesses has already testified that there was a mistake.

Mr. HARLEY: Substantial accuracy is all that the law requires. A photograph or a diagram cannot be absolutely accurate.

The COURT: A photograph would be perfect.

Mr. HARLEY: This substantially represents C-10 and the block from which C-10 was expected to be cut.

(After argument.)

The COURT: It can be offered in evidence, but I understand that the witness cannot testify anything about it. It does not prove the measurement or the excess of stone; that may be exaggerated from the diagram.

Mr. HARLEY: I will withdraw it.

Q. Do you remember the stone C. 10. A. I remember the stone and the lines which went on the stone to be drilled; (1205) we counted the holes and there were 27 or 28.
Q. How did the block sent you from which C-10 was to be cut compare with the finished stone? A. It looked like it was twice the size of the stone which was to be cut from it; Miss Cole put those on there—

Q. (The COURT) If you want to split a piece you have to drill a line of holes? A. Yes, sir.
Q. And then you wedge those? A. Yes, sir; and split them off; that is done by the laborer; a stonecutter don't do that kind of work, and a stonecutter don't allow a laborer or driller to work on their work; that was a stone brought in to be put in shape and to make one of these good net dimension blocks out of I know that myself. I saw that. I do not know who made the diagram, but I do know that. I went out here

and I talked to Walter, or whoever was there, about it and the line was drilled on the stone, I know that.

Q. (Mr. HARLEY) Mr. Graham, there was a letter of March 14, 1908, from Harry E. Scherf to Bernard R. Green reading as follows:

"Baltimore, Md.
427-428 Law Building,
March 14th, 1908.

Mr. Bernard R. Green, Supt. of Construction,
Library of Congress,
Washington, D. C.

"My dear Sir:

Yours of the 11th instant addressed to Frank F. Graham has been handed to me as his attorney for reply. I beg to state that my client has stopped work on the granite work of the south pavilion of the National Museum Building. This act on the part of my client was necessary for his financial welfare in view of the fact of the damage he has sustained, (1206) which said damage was not occasioned by any fault or neglect on his part, by reason of the manner in which this matter has been gone on with on the part of the Government, and their agents in the matter. If this matter can be in any way amicably adjusted he should be glad to do anything that may be fair and equitable between the parties."

Q. Did you authorize Mr. Scherf to write that letter? A. I did; yes, sir.

Q. Mr. Scherf was then your counsel? A. Yes, sir.

Q. Now, another letter placed in evidence and signed by Mr. Scherf was dated March 19, 1908? A. Yes, sir.

Q. Mr. Scherf was then your counsel also? A. Yes, sir.

Q. That is before you came to Mr. Gaither? A. Yes, sir.

Q. This letter reads as follows:

"Baltimore, Md.,
427-428 Law Building.
March 19, 1908.

"Mr. Bernard R. Green, Superintendent of Construction,
Library of Congress, Washington, D. C.

"My dear Sir:

"Yours of the 18th instant addressed to Mr. Frank F. Graham has been handed to me for reply. I desire to state

that we cannot concede any default on the contract for the granite for the south pavilion for the National Museum in Washington, District of Columbia. All defaults happening in this matter, according to our contention, are on the part of the Government. We would only be too glad to do all that is fair and equitable between the Government and Mr. Graham, (1207) and we are perfectly willing to have the Government use our plant, provided the damage we have sustained can be amicably adjusted.

"Hoping this matter can be abjusted without legal proceedings, I beg to remain.

"Most respectfully,

"HARRY E. SCHERF."

"HES/JFF"

Q. Did you authorize your then attorney to sign that letter? A. I authorized Harry Scherf to send that letter.

Q. When did you stop work on this job? A. I couldn't tell you whether it was the 6th or 7th of March, somewhere along there.

Q. 1908? A. Yes, sir.

Q. Tell the gentlemen of the jury why you stopped? A. Well the conditions got so that I was not paid up for what I thought was owing to me for the rough stone coming in and the extra freight on the rough stone and the rotten stone coming in and the drilling I had to do on the stone and cutting these—what do you call them—

Q. Cutting what, sir? A. I cut a lot of stone that was delivered over in Washington out of the stock which they said was Graham stock; I never cut any of my stock; I cut these slabs that came off the car from Bethel.

Q. And you paid extra freight? A. Yes, sir.

Q. And Mr. Green refused to pay that? A. Yes, sir.

Q. And have you been paid for saving what is known as Graham stock? A. No, sir, I was not paid except the work (1208) on it—

Q. What was the condition of your yard March 6 and 7? A. They could not have gotten it any fuller; there was several cars out there on the track and we could not unload them.

Q. How many cars were on the track? A. I don't know that; I was paying demarrage on the cars out there.

Q. Could work profitably with all this stone in your yard?

Mr. McLANAHAN: Now, I object. We have allowed this to go on and we have heard this testimony as to this demurrage and so on, but we object to this question. Mr. Graham had charge of the transportation of this stone and we had nothing to do with it at all. If he did not want any more stone he could have stopped those cars from coming.

The COURT: I will take it subject to exception.

Mr. HARLEY: You can answer the question.

The WITNESS: I don't know what it is.

Mr. HARLEY: Will you read him the question?

(The last question was then read by the stenographer.)

(1209) A. No, sir.

Q. Why not? A. Because the stone was piled up in there on top of each other, just like if this room was piled up and you could not get in the room or in the doors, that is how it was piled up in my yard; them photographs will show you that.

Q. Do you know how many cars you shipped to Washington in March? A. I couldn't tell you.

Q. The evidence shows that it was two or three? A. Yes, sir; the evidence shows it.

Q. Now, Mr. Graham, what did you do about that time, did you make any effort to get your money? A. I went over to see Mr. Green to get a check and I could not see Mr. Green or Mr. Sheehy, and some other person in the office gave me a check for $2,700 and said that was the money which Mr. Green had for me.

Q. Did you ask to see Mr. Green? A. Yes, sir, and I could not see him.

Q. Did you ask to see Mr. Sheehy? A. Yes, sir; but I could not see either one of them, the only person I saw was a clerk who gave me the check and I signed for it.

(1210) Q. Do you remember the date? A. I couldn't tell you what date it was; it was in March I think.

Q. Then what did you do—was that before you stopped work? A. Yes, sir.

Q. Then what did you do? A. I went over and Miss Cole got the pay roll up and I paid all the men off; I sent my boy to the bank and I got the money and paid all the stonecutters and everybody off and stopped.

Q. Did you go on with any other work in your yard? A. A week or so afterwards we cut some stone for Annapolis.

Q. A week or so afterwards? A. Yes, sir.

Q. What was it your intention to do about this Government work?

Mr. McLanahan: We object.

The Court: Objection sustained.

But the said question was objected to by the Plaintiff's Counsel and the court sustained the plaintiff's said objection and refused to permit the witness to answer the same.

To which action of the court in sustaining the objection to said question offered and propounded and in refusing to permit the witness to answer the same the defendants and each of them then and there excepted and prayed the court to sign and seal this their thirty-fifth bill of exceptions which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Thirty-sixth Bill of Exceptions.

(1211)

After the matters set forth in the defendants' aforegoing bill of exceptions, all of which are hereby incorporated in and made a part of this their thirty-sixth bill of exceptions at the trial of this case the defendants to prove the issues on their part offered and produced evidence as follows:

To the witness, Frank F. Graham, still under direct examination.

Q. Then, subsequently, my understanding is that you attorney wrote for you the letters which you have identified this morning? A. Yes, sir.

Mr. Harley: Gentlemen, you put in the letter of February 18 which had an enclosure. This (indicating) is the enclosure.

Mr. McLanahan: That is all right.

Q. I hand you this letter of February 18, 1907, which is already in evidence and which was addressed to you from Mr. Green, and I also hand you this paper marked "enclosure". Will you state if that is the enclosure received with this letter. Is this the enclosure? A. Yes, sir.

Mr. HARLEY: I offer the enclosure in evidence and I will read it.

"I think the proper method of inspection, invoicing, etc., should be as follows:

Stock to be quarried and shipped with very special reference to order of building, namely, A course first, B, course next, and so on. In the mean time, a long forward eye should be kept on the quarry for the timely getting of the large and more difficult stones. It goes without saying that in order to keep the building going, in its present greatly delayed condition, (1212) while the courses are filled up in the order of building as above, much quarrying and delivery of the large stock and that which must be elaborately set, should go on simultaneously.

No stone should be shipped that has not received a thorough inspection and approval by the inspector, to guard against, not only deficient patterns, but unduly excessive stock and especially flaws of any kind that might cause the condemnation of the stone after it has left the quarry.

The inspector's mark, of some distinctive character, should be placed on the stone as approved by him. To do all of which a fair system of handling the stock and loading of cars should be followed, to give him a reasonable opportunity of doing his work without spending too much time at the quarry and away from you cutting sheds.

* * * * * * * * * * * * *

Each car load should be invoiced and billed to Mr. Graham, and two duplicates of the invoice should be sent to this office. One of these we will supply to the inspector in Baltimore. The invoices, as heretofore, should show the designation, cubic dimensions, and contents of each stone, and should be submitted to the inspector and receive his signature and approval.

The matter of adjustment of the stock and cutting for the pilasters which occur on the general junction lines, east and west of the south pavilion, between your work and Mr. Graham's, may readily, I think, be arranged by you, and perhaps best, through the mediation of Mr. Pirie, the inspector, and I have written him to that effect."

CROSS EXAMINATION.

Q. (Mr. HILL) Here are the contract, the bond and specifications; will you hold them in your hand a minute, please; I want to ask you some questions about them. Before

you made your bid for the contract now in question, did you (1213) read over all those specifications there? A. Yes, sir; Mr. Mason and I read them over.

Q. Mr. Mason is your architect? A. Yes, sir.

Q. Did you read each of them yourself? A. Yes, sir; I read over them.

Q. You yourself, personally? A. I don't know whether I went over every item or not, but I think I did.

Q. Will you look at the general instructions and conditions to govern bidders and contractors which you will find in there?

The WITNESS: What page is it?

Mr. HILL: If you will just turn back there you will find it. Will you look at that?

The WITNESS: You read it to me and I will answer you.

Q. I want to ask you if you read over all of those. Here is a portion which is called the General Instructions and Conditions to Govern Bidders and Contractors, which contains 44 sections; did you read that before signing the contract? A. I must have read it if it was in the specifications.

Q. Have you read it since you signed the contract? A. I don't know whether I have or not.

Q. As a matter of fact, you have not? A. I have not since the contract was signed; I had no occasion to do it.

Q. Here is the proposal for cut granite (indicating) and here is the contractor's bond and here are the articles of agreement. On the back of the articles of agreement, or, in the articles of agreement, are 12 paragraphs. At the time you signed those articles of agreement, did you read the whole thing (1214) carefully? A. I read it over; yes, sir.

Q. Have you had occasion to read it over since? A. No, sir.

Q. That is, since you made your proposal and signed the contract you have never really seen this contract? A. There was no occasion for me to see it.

Q. So you have never really seen it since? A. I have never really seen it since.

Q. Now, I call your attention to paragraph 5 of the specifications.

Let me read this to you:

"Bidders for the Bethel granite work will therefore bid on the basis and understanding that the granite is net dimen-

sion blocks—one block for each separate pattern—will be furnished to them without unnecessary delay and without charge, free on board cars at the quarry at Bethel, Vermont."

Under this contract was Bethel granite furnished to you, one block of each pattern? A. It was furnished me in one block for each pattern, but it was not sent to me net dimension block, and the specifications don't say anything about quarrying any of these blocks. Show me that, will you?

Q. Look at specification No. 9 which I will read to you: "The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at one-quarter-inch to the foot scale (¼"—1') prepared, letter d and numbered as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of the work on the cutting of the (1215) stones they represent, to give ample time for examination and approval."

Did you have prepared, lettered and numbered, as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of the work on the cutting of the stones they represent, the setting plans referred to? A. Mr. Mason got to work on those setting plans and he had enough ready to keep me for at least a month or two after that. He turned overdrawings enough in thirty days to run my yard two months that time of the year.

Mr. HILL: I don't think you have answered the question. Read him the question again, please.

The COURT: I think he has answered it.

Q. There is in evidence here a letter of October 20, 1906, written by Mr. Green to you. He states: "In the meantime, however, it is very important that you should enter upon the vigorous preparation of the setting plans of the work for the examination of the architects and my approval. In making the plans I think it best to adhere to the same designations of courses by letters which appear in the Architect's plans. As to the numbering, it seems to be best to make one series for each course from left to right as you face the building. The drawings should be on tracing cloth this time, instead of paper which you used for the court yards. The scale of the plans should be ¼" to the foot, and they should consist of elevations and a plan of each course in full, not a perspective or isometric representation such as you used in the courts."

Did you hand that letter over to Mr. Mason? A. I think I did, but I do not see how you could set stones until you have a setting plan. We used them every place; there was nothing said about those setting plans on the other job; Mr. Green said
(1216) they were nice drawings.

Q. Section 32 of the specifications says: "All joints, beds and builds must be full and fine joint out and free from large plug holes, the axe to be freely used. They must be carefully worked from true and full margin drafts." Will you explain what that means? A. That means when you get one of these net dimension blocks from the quarry that you must straighten it up and bush it up and put your molds or dentils in or whatever goes in, and dress it off, and then Mr. Pirie was to inspect it, and if it did not come up to his inspection then he rejected it.

Q. What was a plug hole? A. It was taking a drill and driving a hole in the stone.

Q. How deep would a plug hole be? A. Sometimes it runs all the way through; sometimes they spoiled the stone, and sometimes they hardly go in at all.

Q. What do they use them for? A. To take the rough off.

Q. Where do they do that, at the quarry or at the stone yard? A. According to those specifications they have to do it at the quarry.

Q. There is no general rule as to how deep the plug hole is to be? A. Two inches or two inches and three quarters, that is, for the drill.

Q. Suppose you had a stone like that (indicating) would you have a hole like that? A. We had ashlar out with holes right in them and we had to go to the bottom of the stone to make the surface complete.

Q. Now this says that the stone is to be free from large
(1217) plug holes?? A. I would not expect any plug holes in here.

Q. Then, why was that put in the contract? A That don't make any difference.

Q. It don't make any difference? A. No, sir.

Q. You testified that the plug hole might be $2\frac{1}{2}$ or $2\frac{3}{4}$ inches? A. I am talking of the drill hole.

Q. Did you understand that you were to take off and free those stones from large plug holes? A. No, sir; I did not understand that. A stone that comes in there net dimension block don't have to have plug holes in it.

Q. If you had known that that provisions which I read to you was in the contract, would you have said yesterday that you expected to get that stone sawed? A. Well, that one spec-

ification says net dimension blocks, and nothing else, and a net dimension block means a perfect block.

Q. A net dimension block means a perfect block? A. Yes, and if the Government made the inspection and Mr. Pirie was the inspector he would expect me to have a perfect block there or he would not accept it.

Q. And you expected to get from the quarry in Vermont a perfect block? A. As near as it could be.

Q. A perfect block and absolutely perfect dimensions? A. Yes, sir; either cut or sawed; that specification calls for a net dimension block.

Q. Your understanding of the contract was that you were to get a cut perfect block? A. I don't say that; that is what the specifications says; I was satisfied if it was an inch or two (1218) or even three inches—

Q. Two or three inches over? A. I don't mean on all sides, but if they are going to lay off an 8 inch piece, they cut a 17 or 18 inch stone and slab it in half; I don't see why they should have sent all these rough blocks down for me to cut.

Q. Now, didn't you estimate this contract at 55,000 cubic feet? A. More or less.

Q. Wasn't that your estimate, as a matter of fact? A. I couldn't tell you whether it was or not.

Q. Didn't you have a conversation with Mr. Pirie about that? A. I thought ever if there were 60,000 I thought I would make twenty or twenty-five thousand dollars with my machinery if it was brought in in net dimension blocks. I did not want to and I don't want to hold you to a cut or sawed block, but if this had been anything near this specification, then we would have made money; we put our machinery on it and where it should take an hour or so it took a day or three-quarters of a day—Mr. Pirie can tell you.

Q. Well, did you ever mention to Mr. Pirie or did you ever write to Mr. Green that you thought that you thought you ought to get sawed blocks under this contract? A. I did not have any occasion to do that I said I was satisfied to go ahead and I would have made money on the contract if they had been anything near what was right.

Q. And didn't you give the contract up because you cubed up this job and saw that you had made a mistake of about 5,000 cubic feet? A. No, sir; I did not. I stopped because I could not get any money. I did not pay any attention to what Mr. Pirie and my bookkeeper said, they were up there (1219) attending to that cubing.

Q. But didn't you cube this job up? A. No, sir; they were cubing it up.

Q. Didn't you tell your bookkeeper to cube up this contract within ten days before you threw it up, and didn't you then find that you were short 5,000 feet? A. I never did.

Q. Didn't you tell her to do it? A. No, sir.

Q. Didn't she do it? A. I don't know what she did.

Q. Didn't you know ten days before you threw up the contract that there were 5,000 cubic feet more than you thought in the contract? A. I knew there were fifty-eight or fifty-nine thousand.

Q. And didn't you underestimate this contract? A. I did not under-estimate it, but it was not brought in right.

Q. Didn't you under-estimate this contract and then find it out? A. There are lots of jobs that I have under-estimated—that is, I did not estimate them exactly, and still I come out all right—

Q. But didn't you entirely forget in your estimate of this job the portico ceiling stone? A. No, indeed. I had the contract with the carver to do the carving all over the building. How could I have forgotten it?

Q. When you told Mr. Bailey and Mr. Pirie on the day the contract was put in that you estimated it at 55,000, did you have in mind the portico ceiling then? A. Yes, sir; certainly.

Q. Didn't you on March 11, 1908, direct the cubing up (1220) of stone in your yard? A. I don't know anything about that; I did not do it.

Q. Didn't you on March 1 direct the cubing up of the stone in your yard? A. I did not do it.

Q. But didn't you know about it? A. They were doing that; they were running my place.

Q. And you knew the result of their cubing? A. I heard that there were about 60,000 feet there; it was a rumor, that is all.

Q. At the time you signed this contract had Mr. Green or any one else given you an estimate of the amount of cubic feet in this contract, an official estimate? A. I don't know whether they did or not; I know that the young man said my estimate did not come within ten or 15,000 of the contract.

Q. (Mr. GAITHER) Ten or fifteen thousand what? A. Ten or fifteen thousand dollars; he said Mr. Green would never have awarded to these people for $200,000; he said they would have readvertised it first; Mr. Sheehy told me that himself.

Q. Under the instructions to bidders and contractors in section 21 it says:

"Bidders, or their authorized agents, are expected to examine the samples and drawings referred to in the specifications, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies."

Did you, before you made this contract, visit the Bethel quarry? A. I didn't have any right to visit the Bethel quarry, because the specifications covered all the stone that was to
(1221) be furnished to me to cut, to be in net dimension blocks.

Q. Did you know these conditions on which you made this bid advised you to go and make an examination of the Bethel quarry? A. What good would that do me? I couldn't tell anything by looking at the quarry.

Q. As an expert stonecutter you know that it is harder to cut stone in the winter than in the summer? A. Certainly, and you know that.

Q. And it is harder to quarry? A. Yes, sir.

Q. Now, if you have a quarry which is in Florida where they never have winter, and one which is in Bethel, Vermont, which is the harder to quarry in the winter—in which is it harder to cut the stone? A. That would not make any difference to me; I was to get the stone free on board the cars at Bethel, Vermont, I would not care how the quarry laid, whether up or down or anything else.

Q. Didn't you make a contract with the Noel Construction Company for work at Annapolis? A. Yes, sir.

Q. And did you read the specifications in this case? A. Yes, sir; and I was always able to do my work with them.

Q. But didn't you have to pay a penalty on that work?

The WITNESS: A penalty?

Mr. HILL: A forfeit, for being late on that work?

A. He exacts that from everybody.

Q. How many days at $100 a day did you have to pay for? A. I couldn't tell you.

Q. Section 21 says:

"Bidders, or their authorized agents, are expected to ex-
(1222) amine the samples and drawings referred to in the specifications, which are open to their inspection, to visit the locality of the work."

Did you do that? A. I saw the samples which they had in Washington and they looked good enough to me.

Q. Did you see this advice to visit the locality of the work?

Mr. HARLEY: The locality of the work was in Washington.

The WITNESS: And in my own yard.

Mr. HARLEY: Certainly, he could not go in the quarry.

The COURT: I think the natural meaning was that the contractor should examine the locality of the work where the building was to be erected.

Mr. HILL: But let me read you that whole section again (reading) That certainly applies to the quarry.

Q. (Mr. HILL) You have testified that it took you about two months to get ready in your yard for this contract? A. Yes.

Q. What changes did you make in your yard? A. I couldn't tell you now to save my life.

Q. You said you spent considerable money? A. I know we put in a new derrick and a boiler and a new hoisting engine in.

Q. How much did the boiler cost you? A. I couldn't tell you; you can ask Miss Cole there and she might tell you; she had the books; or Mr. Pirie might tell you. He has been looking over the books in the office; they kept those things together. Then ran my business.

Q. Do you mean to say that Miss Cole and Mr. Pirie ran your business and that you never knew anything about it yourself? A. Certainly he ran my business. He went out in the yard and talked to the men there and spent half an hour talk-
(1223) ing to them while I was paying them $3.60 a day to do my work.

Q. And he would know about the cutting of the stone in the yard, more about it than you? A. Yes, he was around there all the time.

Q. And he knew more about the cutting of the stone in your yard than you did? A. Yes, sir; because he would not let us interfere with him. He would tell the men to cut it this way or that way and we were afraid to interfere with him because he was a Government inspector and he did it right along. One time he interfered so much that I said, if I catch you doing that any more I will throw you out of this yard, and from that time on it was not much better.

Q. Did you ever complain to Mr. Green about it? A. What was the use; I asked him to pay me my extras and he would not pay that.

Q. Didn't you get a check from Mr. Green the day before you threw the contract up? A. No, one of his clerks gave it to me.

Q. Didn't you asked Mr. Green as a special favor to you to send Mr. Pirie over there to your yard? A. Well yes, but I was told by George Mann that he would break me; he said, he will break you, he got me for $50,000, but he come in and we took a drink together and he blarneyed me and I took him. I have always been square with everybody, but he turned out exactly as George Mann told me he would.

Q. How much did you pay him for that engine? A. It was a $1,200 engine.

Q. Did you know how much you paid for it? A. You can ask Miss Cole, she knows about those things.

Q. She knows more about your business then— A. Than I do myself; yes, sir; I told her to get this letter together, and (1224) it was her letter and not mine. She wrote it. She must have got it somewhere.

Q. How much were the other items? A. She has the books I will leave it to here; she is the one that wrote the letter to Mr. Green and told him how much I would spend.

Q. Then you don't know yourself? A. How could I know, I was seldom in the office; I was not in the office more than an hour a day.

Q. You were very often away from the yard? A. Well, there was nothing to do there.

Q. You were often away from the yard in 1908, weren't you? A. Not 1908.

Q. Two weeks at a time, weren't you? A. No, I was always on the job; I was away from the yard in the summer time when there wasn't anything to do.

Q. When did you pay to the surety company the last premium on the bond? A. I couldn't tell you that. Miss Cole wrote all those checks out and kept the run of those things; you can ask her.

Q. You know that you paid another premium after September, 1907? A. I never paid them anything only the first time.

Q. Didn't you tell Mr. Sheehy that you had been always from the yard a week before you got that last check? A. No, I did not tell him that.

Q. Weren't you away, as a matter of fact? A. Where could I have been—I don't know—unless I went to the country?

Q. Weren't you in Richmond? A. Richmond, where?

Mr. HILL: Richmond, Virginia.

The WITNESS: When?

Mr. HILL: The week prior to the time that you threw (1225) up the contract?

The WITNESS: The week prior?

Mr. HILL: Yes, the week before.

A. I was there one day; it did not take a whole week to go to Richmond and come back.

Q. You had testified that you have *saw* all the carloads as they came in; is that correct? A. I did not examine all of them. I examined the majority that came in first and I threw the job up—

Q. How many cars came in to you from the quarry on the part you cut? A. You look at the freight bills, they will tell you. I did not carry all those things in my head.

Q. Will the invoices show it? A. The invoices will show you exactly how they came in.

Q. You told Miss Cole before you got that last check that you were going to quit as soon as you got that check, didn't you? A. No, indeed; if she says that she tells something that is not true. It would be foolish; I would not be as foolish as to say anything like that to anybody.

Q. Will you look at those invoices?

The COURT: What do you want to ask him?

Mr. HILL: He testified that he examined the stone as it came in from the quarry. I want to ask him certain questions about the stone as it was received.

The COURT: Mr. Graham admits that the invoices correctly describe the stone that he received from the quarry.

Q. (Mr. HILL) Do you admit that those invoices correctly describe the stone as it was received from the quarry? A. I never saw them.

Q. Will you examine them? A. I wouldn't know any more about it after I examined them. There are the bills as

(1226) they came in, in that book there, and everything is in that book.

Q. You testified that from October 23, 1906, to October 1, 1907, you did not cutting on this contract; is that correct? A. We cut a car or two cars. We went to work on it as fast as it came in. We cut some work outside of that for Baltimore City and Annapolis.

Q. You cut two cars? A. I don't know—as soon as they came in we hired men and went to work on these; I don't know what it was.

Q. Do you know how many cars arrived in January, 1908? A. That book will show you exactly if you will let it go in evidence.

Q. Did you keep that book? A. No, that was kept by Miss Cole, and the cubic contents was pasted on there and also the freight bill and that shows when the car arrived and everything else.

Q. Could you tell me by looking at that book how many cars came in in the month of January, 1908 and how many of those cars you examined personally yourself? A. I examined the stuff when they started off the same as I do on every job to see if they are up to the specifications.

Q. Could you, by looking at your book, tell how many cars came into your yard in 1908, and how many you personally examined yourself? A. I tried to examine all that came in My brother and I went and put the rule over them to see how much excess of stone there was in those stones.

Q. If you saw that book, though, could not tell me how many cars came in that you personally examined yourself in January? A. The book shows the cars that came in and we examined them; that is all I know.

(1227) Q. But could you tell from that book how many cars came in that you personally examined yourself? A. What has that book got to do with that when I measured the stone up—

The COURT: There is nothing on the book to know whether you examined them *them* or not?

The WITNESS: No, sir, your Honor.

Mr. HILL: I would be very glad to have the witness refresh his memory in any way, because I want to know how many cars that he examined that came in in January.

Mr. GAITHER: Here is the book, and that has every car and every stone in it. Let him look at that.

Mr. McLANAHAN: Show us the stone that came in there in January, 1908. We will let the book go in for him to use to refresh his recollection. We will allow him to use that book if he knows about that book personally.

Q. (Mr. HILL) Now, Mr. Graham, you would not recollect how many cars came in and how many you inspected in February? A. In the same way when the car came in we got on it and examined it and that was all.

Q. How about March, 1908? A. In March—I left orders for them to measure the stone, my boy Frank, and Walter and Heidle. There was no occasion for them to measure it wrong and when they finished they carried them over to Miss Cole and told her.

Q. Then, as a matter of fact you did not measure them yourself but your brother did it? A. I did not measure them except where he would show to me and then we would put a rule on it and then the drill and fix them up, when he would show them to me—

Q. As a matter of fact, I say, you did not measure the (1228) stone? A. I was there sometimes when they measured it, and at other times I might not be there.

Q. How many pounds of rough stock to a cubic foot would you consider a fair average? A. What kind—net dimension, 165 pounds, and quarry dimension block would run about 200 some of the freight bills will show you that they ran less than that.

Q. Suppose you got a quarry block running 200 to the cubic foot?

The WITNESS: A random block?

Mr. HILL: No, I mean under this contract.

A. Well, a random block we would have to slab off.

Q. I mean a block under this contract? A. They have no right to bring random blocks in as they did do, but 190 and 150 and 140 pounds they brought them in; the contract did not call for stone like that at all.

Q. (Mr. GAITHER) What do you mean by 190? A. I mean 290.

Q. (Mr. HILL) What is the greatest amount of rough stock to the foot from this quarry to which you would not object? A. I would not make any difference if you objected or not; if they came in 400 pounds and you objected it would not make any difference.

Q. Why did you write to Mr. Green and say that you had no objection to anything under 225 pounds per cubic foot?

Mr. HARLEY: He didn't say anything like that.

The WITNESS: I didn't say it.

Mr. HARLEY: I suppose you refer to his letter of February 14, 1907.

Mr. HILL: I will read the letter and then show it to you.

The WITNESS: All right, read it.

Mr. HILL: It reads as follows (Reading):

(1229)

"Baltimore, Feb. 14, 1907.

Mr. Bernard R. Green,
Supt. Const. Natl. Mus.

Dear Sir:

"The first car load of stone from the quarry at Bethel reached my yard on the 13th inst.

"The patterns are extremely rough, causing me to pay a large amount of unnecessary freight.

As a rule rough stone never runs more than an average of 225 lbs. to the ft. and often a good bit less. This stock we have just received, run according to my freight bill about 295 lbs. to the ft."

Q. You made that complaint contained there, did you not? A. That letter did.

Q. Is it right? A. Yes, sir.

Q. That is, on February 14 you complained of extra freight in 1907? A. The letter did.

Q. The letter was sent with your authority? A. Yes, sir.

Q. What did Mr. Green say in answer to that? A. I don't know what he said.

Q. (Reading) "As a rule rough stone never runs more than an average of 225 lbs. to the ft. and often a good bit less."

The WITNESS: You bet it runs a good bit less.

Q. (Reading) This stock we have received, runs, according to my freight bill about 295 pounds to the foot." A. They are random blocks he sent in them; they were not dimension or net dimension either.

Q. What did you mean by saying "as a rule rough stone never runs more than an average of 225 pounds to the foot? A. Did I say anything about dimension blocks or net dimension blocks—

(1230) Q. Were you getting anything except one kind of block from the quarry? A. Net dimension blocks or quarry dimension blocks—

Q. Does your specifications call for different kinds of block? A. One kind of block, that is the net dimension block.

Q. Then, when you were writing to Mr. Green about this contract, would you have written about more than one kind of block? A. I may have written about other stone saying that it would never run more than 125 or less—

The COURT: 225.

The WITNESS: I am talking of a dimension block which never runs more than 225.

Q. Did you ever see a contract with the words dimension block in it before?

The WITNESS: What did he want to put that in there for?

Q. I asked you if you ever saw a contract with that specification contained in it before? A. Well, what did he want—

The COURT: Answer the question?

A. No, I never, but it is in there just the same.

Q. What did you take those words "net dimension blocks" to mean? A. I said, these are going to be the best patterns that have ever come into Baltimore when I saw that in there, but since I found out that a net dimension block means a perfect block and I am trying to hold you now to that specification—

Q. Your idea is that it is 165 pounds to the square foot? A. Yes, sir—

The COURT: I cannot see the use of going over that. Mr. Graham said that he would have been satisfied with a block had it been 2 or 3 inches larger?

(1231) The WITNESS: I mean a good pattern, split as they do in other quarries, with one face right, but they never gave me no face right.

Q. (The COURT) You say that dimension block should have been 225 pounds per cubic foot and that it was often less than that?

Mr. GAITHER: No, he says rough stone.

A. Yes, I say rough stone.

(The COURT) There is a great deal of consideration to be given to the construction which was put upon the parts of the contract before any controversy arose.

The WITNESS: Reading that specification you would take it all to be very nice and neat patterns when they say net dimension stones—that is, as near as could be quarried—but a net dimension block calls for a sawed block.

(The COURT) But you did not expect anything of that kind? A. No, sir.

Q. You wanted a stone that should have exceeded the dimension given by about 2 or 3 inches? A. That is right.

Q. (Mr. HILL) Didn't you, in reading the contract, treat the stone as what is known as dimensions blocks? A. I never said anything about that. As the stone come in it was too large and we put a drill on there and shaped them up.

Q. Now, on December 18, 1907, you sent a bill for $1,420.90 to Mr. Bernard R. Green, and at that time you had two-thirds of all the stone which ever came to you under the contract, to your yard?

Mr. GAITHER: That is figured on the first 65 cars.

Q. (Continuing) You then made a claim of extra freight of $874.40 and for roughing out, $546.50. Now, here is a (1232) letter which you received from Mr. Green dated December 28, 1907, which reads as follows:

"Washington, D. C., Dec. 28, 1907.

"Mr. F. F. Graham,
Calhoun street & B. & O. R. R.,
Baltimore, Md.

Dear Sir:

I have to acknowledge the receipt of your letter of the 18th instant and the bill of $1,420.90 therewith, accompanied by tabular details explanatory of the charges you *you* therein

make for extra freight and roughing out on the stock you are receiving for your cutting contract for the National Museum building.

You have occasionally referred to this subject orally."

Have you referred to that subject before to Mr. Green? A. I couldn't tell you.

Q. (Reading) "but I have more than once told you that it was a matter that I could neither settle or control other than to do all that seemed to me reasonable in requiring the Thompson-Starrett Co. to send you good patterns of stock. This I have always done, and although not so successful as desired in the beginning, I have heard no complaints for a good while past."

After you received that letter did you cut more stone? A. Certainly I did; but I never received any more money.

The COURT: What date was that?

Mr. HILL: December 28, 1907.

Q. Did you receive any payment after that time from Mr. Green for stone which you cut for him?

The WITNESS: Read the question again.

(Question referred to was then read by the stenographer.)

The WITNESS: After what time?

(1233) Mr. HILL: December 28, 1907.

A. Certainly he paid me according to the invoice.

Q. Well, here is voucher dated January 4, 1908, in favor of Frank F. Graham for $3,600; is that your signature? A. Yes, sir.

Q. You signed this certificate which reads: "I certify that the above— A. (Interrupting) I never looked it over, but when he handed me the check I signed it.

Q. Do you mean to say that you sign a paper and did not know what you were signing? A. I signed it because I thought that was all the money I was getting on these invoices when I went over there.

Q. Then you signed this: "I certify that the above bill is correct and just and that payment has not been received." Did you know that that statement was there when you signed it? A. I never even read it over. I thought he was honest enough to pay everything.

Q. On January 24, 1908, you signed this voucher for a payment to you of $5,400; that is your signature, is it not? A. It is.

Q. And again on February 14, 1908, and March 6, 1908, you signed those? A. Yes, sir.

Q. Each one of those vouchers contains this certificate: "I certify that the above bill is correct and just and that payment therefor has not been received." Under that your name is signed? A. Yes, sir.

Q. Now, after Mr. Green refused to pay you that six hundred and some odd dollars for cutting the extra stock, why didn't you abandon your contract then instead of waiting three (1234) months to do it? A. I don't know anything about that, why I didn't do it.

Q. You don't know? A. No.

Q. How much did it cost you a foot to cut the stock that you cut for the Government? A. I couldn't tell you that either; I know it cost twice as much as it would have if the stock had come in the right way.

Q. How do you know that? A. On account of the rough on it.

Q. But you don't know how much it actually cost you to cut a foot of stone? A. I couldn't tell you that to save your life. I know that if it is to come in with an inch rough on it and it comes in with 6 inches rough on it, then it costs just six times as much.

Q. Now, on December 18, 1907, as I have just read you, you wrote to Mr. Green and made a claim against him of $874.40 for extra freight on the excess roughness of the blocks and $546.50 for roughing out the extra blocks, making a total of $1,420.90. Now, if Mr. Green had paid you that you would have been satisfied, wouldn't you? A. I don't know; if he had paid it I reckon I would have taken it.

Q. Wasn't that the amount you claimed from him as full satisfactory? A. He didn't even pay me that, and if I had claimed $500 I never would have gotten it, and if I claimed $500 I never would have gotten it, and if I claimed ten thousand I wouldn't have gotten it. What is the use of talking about it then?

Q. But you would have been satisfied, wouldn't you? A. I can't say that.

Q. Didn't your claim, enclosed in that letter, cover all the damage to you which you claimed for rough stock up to (1235) the time of that letter? A. I don't know whether it did or not.

Q. You don't whether it did or not? A. No, the damage to me amounted to a great deal. It amounted to twenty or

$25,000; that is the damage which I sustained from the Government making me handle that work that way.

Q. Can you give me an itemized account of that? A. No, sir; I am not a bookkeeper; Miss Cole kept the books.

Q. You did not know how the contract was going at all? A. I was out there trying to make it go as good as I could, the same as any other contract.

Q. Did you ever go over and balance up the books? A. The bank account always balanced my books. I would tell how much I owed and how much I was running ahead on a job from that. I always ran ahead on every job but this job.

Q. How about that Noel Construction job, the one that you paid the forfeit on? A. I should say so; I made money all the way through on that.

Q. You made money by being late on that? A. I don't know whether I did or not, but I made money on it.

The COURT: That is an outside matter.

Q. Did you ever go over any books that you had at your yard to see how many stone were left to be cut and how much stone had been cut? A. I left all that to Miss Cole; she had all that in her book.

Q. You have testified concerning the stone No. C-10 which was referred to in the diagram which Mr. Harley showed you? A. Yes, sir.

(1236) Q. When did that come in? A. I couldn't tell you that; I know my brother and I went out there and put the line on it and then this diagram was made. Miss Cole can tell you more about that than anybody else.

Q. That stone was included in that statement, was it not? A. I cannot say.

Q. Suppose I tell you that that was received June 17 in your yard? A. Well, I don't know anything about that, but we measured it.

Q. That particular stone you measured? A. Yes, sir; Walter and I measured it and the line was run.

Q. How can you state that it was that particular stone? A. Because I remember the diagram being made at that particular time and if the diagram was made then it must have been measured and the diagram shows how many drill holes it took.

Q. Do you know who made this diagram? A. No, sir; but Miss Cole does, because her writing is on the diagram.

Q. Did you make a diagram for every stone that you considered too rough? A. No, what would be the use of it; you would not get anything for it afterwards, any way, after you made it.

Q. Now, did you ever made any other claim for excessive rough stock after you made this claim?

The WITNESS: What would have been the use?

Q. After you received that letter you said to yourself, I cannot get it, and then you did not bother any more about it? A. There wasn't any use bothering any more about it.

Mr. MCLANAHAN: I will state for the stenographer that that is the claim of December 18, 1907.

(1237) Q. You testified that there came from the quarry all the large stones at one time, at the time you abandoned the contract, is that right? A. They might not all have come at one time, but the yard was full of them.

Q. Full of very large stones? A. Yes, sir.

Q. Was your yard full of these excessively large stones because they all came in at once or because they accumulated there? A. I mean those big ones on the corner and the column caps with the rough and all that was on them we could hardly unload them; we couldn't use the derrick—we had to roll them off with the derrick.

Q. In other words, your derrick wasn't big enough to handle those stones? A. The derrick was large enough to handle a net dimension block or a quarry block at the size the specifications called for.

Q. Are you sure of that—are you sure that it was strong enough and big enough? A. It handled them all right—the derrick did not fall down.

Q. Did you pick them up clean? A. We got them off the car.

Q. You rolled them off and hiked them, didn't you? A. We got them off; we can lift 10 or 12 tons around there anywhere. How large does one of those big stones weigh net? I can tell you that if we could lift it or not.

Q. Take Y course, stone Y-15, that is 11 by 7.6 by 2 feet 1½ inches.

The WITNESS: How many cubic feet are in it? We have a book in the office that will give you that in a second.

(1238) Mr. HILL: Here is the book. You can cube it if you will.

The WITNESS: I am not going to cube it.

Mr. McLANAHAN: We want to see if he knows how to cube it.

The WITNESS: What is the size, I will cube it in my head.

The COURT: Mr. Graham says that he hires others to do that for him.

The WITNESS: Give me the dimensions.

Q. The dimensions are 11 by 7.6 by 2 feet 1½? A. About 190 or 195 feet.

Q. Calling it 195 feet, as you find it, how much would that stone weigh? A. 195 feet—that would weigh about—that is about 14 tons.

Q. Did you have a derrick in your yard to lift that stone clear and put it anywhere you wanted it? A. We could lift that by keeping it close to the derrick.

Q. You could not swing it out, though? A. No, we would not take the chance; we might have been able to do it, but we might have killed somebody.

Q. You could not get that away from the derrick? A. We could have gotten it away, but we didn't want to take the chance.

Q. Why didn't you get more yard room? A. We didn't need it; we have done more work than that in that yard in less time.

Q. Didn't Mr. Green, through Mr. Pirie, urge you to get more yard room? A. He never wrote anything like that to me.

Q. But didn't Mr. Pirie tell you that? A. Well, he is liable to tell you anything. He is apt to start to tell you about a block of granite and end up by telling you something else before he got through.

(1239) Q. Well, is he an ignorant man? A. He is apt to tell you about a block and end up by telling you about something across the street.

Q. Does he know anything about stone-cutting? A. I don't know that. He can try a stone up, I know, but a boy can do that, anybody that knows anything about drawing. I know he can interfere with your business all right.

Q. You spoke of cutting a good many ashlars. Can you tell how much per cent. was good dimension? A. There wasn't any—an ashlar where you have to do all that work is not as good a stone as Cornish; we cut Cornish cheaper than ashlar, and you could run it back in the wall—the ashlar is not the cheapest stone in the world to cut.

Q. You said somebody—you did not say who—but that somebody had taken the books from your yard. What did you mean by that? A. I mean after this job was over you could not find any books there.

Q. Didn't you tell Miss Cole to take those books to Mr. Scherf's office? A. Those were delivered, but when I got back the other books were not there.

Q. What books were they? A. The time books and the invoices—

Q. Three books, was there? A. I don't know; there might have been a dozen.

Q. How do you know they were there before that? A. I saw them using them there and setting different items down in them and different other things. I know Miss Cole carried away a big bundle of bills and somebody told me that she had them and I went up to her house and she gave them to me.

(1240) Q. She gave them to you, did she? A. Yes, after I went to her for them; I don't see what she wanted them for.

Q. Was there any place for her to keep them—was the stone yard open? A. The office was, but I didn't even look at them; I just took them up there and put them in a drawer and afterwards when Mr. Harley asked me if I had anything, then I got them.

Q. Didn't you tell Mr. Green that Mr. Pirie was very helpful and did a great deal to help you with the contract? A. That was the way he was at first, but towards the last he got very obnoxious; he would stand around and talk to the men ten or fifteen or twenty minutes when he should have been *tying* up his stone and going about his own business.

Q. Then, Mr. Pirie's conversational tendencies with you workmen kept you from cutting the stone, did it? A. I am not saying anything about that. I am just telling you what he did.

Q. You testified that during the winter when you had no stone, that is 1906 and 1907, your expense went on just as though you had 200 men at work? A. I mean my brother got the same pay and I spent the same money, Miss Cole got her wages and the engineer got his pay and the fireman got his pay, and the derrick man had to have his pay.

Q. Did you have any cutters there then? A. I don't know how many were there then, but there must have been some few there then.

Q. How many? A. I don't know; if I had the books I could tell you that.

Q. What books do you require to tell that? A. Well, the books will show it and the bills were paid.

(1241) Q. Were those books taken to Mr. Scherf's office? A. Only those there (indicating).

Q. Were all the books taken to Mr. Scherf's office that you directed to be taken there? A. They are over there.

Q. I asked you were all the books taken there that you directed to be taken there? A. I think they were.

Q. Then, why didn't you direct these (indicating) to be taken there if they were so important? A. I didn't think they were.

Q. Why was it that Frank Graham, Jr., took the time book to his house, that time book which you were talking about? A. I don't know anything about that.

Q. You do not? A. No.

Q. You have spoken of what you called Graham stock; how many cubic feet was in that, do you know? A. The invoice shows that; you can look it up.

Q. You testified you were not paid for it when you ought to have been; how much should you have been paid, do you know that? A. I don't know anything about it;; I don't know how many cubic feet there were in those stones they called Graham's stock.

Q. Suppose I should tell you that there were 27 stones in that so-called Graham stock and you claimed $170 for it; is that correct? A. It shows that these stones were drilled after these other stones to get them in the yard—those pieces may have cost me $500.

Q. Were all the stone in the so-called Graham stock dril- (1242) led off from large blocks? A. I couldn't tell you, they come off of some stone and they must have come off of some stone that came in there.

Q. Suppose I should tell you that the stone in the so-called Graham stock was 27 in all and that you claimed that $170; was that correct or not? A. I did not make any claim.

Q. Didn't you claim that you were not paid for it? A. I was not paid for it; Mr. Pirie and the girl, fixed that up; whatever she thought was right she sent out a bill for it.

Q. In other words you let them run your business for you? A. Yes, sir; I did not have any hand in it at all. There wasn't anything done unless Mr. Pirie was consulted about it. He was the boss around that place and I did not have anything to do with it at all. I even had a draftsman up in the same office with them and they made it so hot for him that he had to get out and I had to put him downstairs and fix a room up for him.

Q. Then, why didn't you discharge Miss Cole, weren't you here employer? A. What would have been the use—Mr. Pirie would have made it harder for me then.

Q. Why didn't you throw up your contract then? A. Because I didn't have to.

Q. Wasn't this so-called Graham stock stone that was spoiled in the cutting? A. Only about one—

Q. Weren't the stones changed around when they were rotten? A. They were changed around and put in the building.

Q. How did that come to be Graham stock, then? A. Slabs drilled off of that stone that came in.

Q. When you made a protest against the rotten stone didn't the quarry allow you for it? A. No, sir. Pirie would (1243) say to put in another—

Q. (Mr. McLanahan) Don't you know that the reason of that was because of those stones which you spoiled in cutting? A. No, I don't know what they might have fixed up, but let them tell me one stone that was spoiled on my account.

Q. (Mr. Hill) Don't you know that several times Miss Cole quit work there at your place and that you went to her house and begged her to come back and even raised her salary. A. I don't know anything about that. I know I raised her salary a dollar or two, I don't know when.

Q. Why did you raise her salary? A. Because she wanted it, I reckon; she was the manager.

(Examination concluded.)

Mr. Harley: That is the case for the defendant, if your Honor please.

John Beer, a witness on behalf of the Government, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

Q. (Mr. McLanahan) What is your occupation, sir? A. Granite cutter.

Q. How long have you been in that business? A. About 26 or 27 years.

Q. Are you familiar at all with quarry work, that is the quarrying of stone? A. No, I never quarried any stone. I have worked it after it came from the quarry.

Q. Have you worked in a quarry? A. Yes, sir; cut stone in a quarry.

Q. Who did you work for during the summer and fall (1244) and winter of 1907 and up to March, 1908? A. I worked for Mr. F. F. Graham, at Calhoun Street and the B. & O. Railroad, from July, 1907, until the 6th day of March 1908.

Q. And you worked as a stone cutter, did you not, then? A. Yes, sir.

Q. And that is when they quit, when you stopped? A. Yes, sir.

Q. Where did you work after that? A. For Mr. Andrews out in Northwest Baltimore.

Q. Then where did you go? A. To Washington.

Q. What did you do? A. Worked for the Government.

Q. On this same Bethel granite job? A. Yes, sir.

Q. You were under Mr. Pirie were you not? A. I worked for half a day on a Saturday on a jamb, and then I started with some other men on a cap.

Q. What did you work on then? A. Just one stone caps?

Q. How long were you there, do you remember? A. Well, I went there some time in March and I got through there about the 14th day of May, or something like that.

Q. After you quit working on that cap what position did you hold over there? A. I took the foremanship of the granite cutters.

Q. And you stayed on that until the work was finished in Washington? A. Yes, sir.

Q. Whom do you work for now? A. Mr. F. F. Graham.

Q. You work for Mr. Graham now, do you, over here? A. Yes, sir.

Q. You say you started in working for Mr. Graham in (1245) July, 1907. Was there any Bethel granite there then to be cut, in July, 1907? A. Yes, sir, as far as I could see, as much as wanted by me.

Q. How was the condition up to the time you quit there—was there granite there all the time?

The WITNESS: You mean plenty of stock to keep us going?

Mr. HILL: Yes.

A. Yes.

Q. Were there any other men on that work there in July, 1907? A. Yes, sir; there were a lot of men there; the job had started a couple of months before I went there.

Q. And there were a lot of granite cutters there in July, 1907? A. Yes, sir.

Q. Was there any other work going on there at that time? A. Yes, some Woodstock granite, I think, but that was for Annapolis.

Mr. HARLEY: What is that offered to rebut?

Mr. McLanahan: You said that only two cars were received and that none of it was cut.

Mr. Harley: No, there were some 11,000 and something up to the first of October. We admit that.

Mr. McLanahan: Then, that is conceded.

Q. Now, while you were working in Mr. Graham's yard did any rotten stones come in there to your notice? A. I could not say there were any rotten stones; it would depend upon what you designated rotten.

Q. What is meant by rotten stone? A. There might have been some stone that was sun-dried or top stone; the stone (1246) that I cut was O. K. stone, as far as I know. I worked on the doorway work. I never lined any stone and therefore I could not say as to that. I finished it.

Q. (Mr. McLanahan) You were a finisher? A. A lot of the jambs I took right from the car and cut it right out.

Q. (Mr. McLanahan) The majority of the stones for the jambs came to you right off the car? A. Yes, sir; and some was lined up, one bed and a piece of face.

Q. How about the rest of the blocks? A You could not line that, that was the mold.

Q. Mold and the door jamb? A. Yes, sir.

Q. That was some of the most expensive and hardest work to cut on the whole job, wasn't it?

(Objected to.)

Mr. McLanahan: I want to show that this gentleman is one of the best granite cutters in that yard.

Mr. Harley: We concede that; we all know that.

Q. Then you say that none came to you in the shape that you would call rotten: Now, it has been testified that rotten stone means a stone that you can't cut an edge on, that when you got an edge or corner on the stone it would crumble away. Did you have any trouble cutting any edges or corners on it? A. No, sir; I got mine on all right or they would not have been received.

Q. There has been testimony here by Mr. Graham that this stone was so rotten that the architects in Baltimore would not receive it and put it in the building. What have you to

say to that? Was the ariss straight? A. Why, if it had not (1247) been straight there would have been a cave in; there was no cave in when I left there.

Q. Was that stone rotten or not? A. It was not rotten as far as I could see.

Q. In your opinion it was not rotten?

(Objected to as leading.)

A. No, sir, it was not rotten as far as I saw.

Q. Where have you worked as a stone cutter? A. Well, I have been from one part of the country to the other; I have been in New York and in the West, South and off and on in Baltimore for the last twenty years.

Q. You have worked in New England? A. Yes, sir.

Q. Have you worked any of that granite? A. Yes sir.

Q. What have you to say of the New England as compared with the Maryland granite? A. Some is softer and it takes more careful work to cut it.

Q. The New England does? A. Yes, sir.

Q. How about the Bethel as compared with the New England? A. You have to be more careful with that.

Q. It is a harder stone to cut? A. Yes, sir; it is what we term a more open rift.

Q. In the Bethel stone? A. Yes, sir.

Q. What has that to do with the quarrying of Bethel stone as compared with the Maryland stone; as to the closeness of the line which you lay on the stone when you cut *if*? A. There is a great deal in how the quarry lays; if *a* lays in sheets it is very easy to cut the stone out.

Q. How do the Maryland quarries lay? A. Some in (1248) sheets and some in boulder formation.

Q. How does the Bethel quarry lay? A. I couldn't say.

Q. You have never been there? A. No, sir.

Q. Suppose the quarry lays on an angle like that (indicating) and you were trying to split out blocks, would you have to make your lines closer or make more allowance?

Mr. HARLEY: Did you ever work in a quarry?

The WITNESS: Yes, sir.

Q. Did you ever quarry stone? A. No, sir.

Q. You cut stone, I believe, in a quarry? A. Yes, sir.

Q. And you are not familiar with quarrying? A. Well, I have seen lines laid but was never a foreman for a quarry.

Q. That is out of your line? A. Yes, sir; but I have helped to lay lines in a quarry; I was almost born in one, anyhow.

Q. Are you a quarry expert? A. No, sir; and I am not trying to say that I am.

Mr. McLanahan: But this gentleman is familiar with a quarry.

The Court: I think he can testify.

Q. Now, say a quarry similar to the Bethel lays on an angle, how would you have to lay out the lines to get this stone out as compared with a quarry where the rift ran flat and the lines are all parallel with it? A. Well, if it is in sheets you can cut back (indicating) and make just one rift.

Q. How about where the quarry is on an angle, would you have to allow more? A. Yes, sir, of course.

(1249) Q. Why? A. Because you could not tell how much it was until you cut it and you could not tell how much stone was there until it was split—

Q. But you say you were making a cut in here for a block (indicating); here is your rift and you were starting to drill in this way, how would it tend to run? A. It would tend to run around here (indicating); it usually runs to the weak point; it would run this way.

Q. Up or down—the quarry lays up here and I start to drill in here, and which would be the ordinary way for the split to run? A. That depends on the quarry.

Q. But does it usually run perfectly straight with the face of the quarry or does it run one way or the other? A. It will always run the way of the rift.

Q. If you take this as a stone and start putting your blocks in here that split will not go straightdown, will it? A. If it was running up—

Q. Well, say this desk is a *blon* an angle and I started drilling, drilled holes in here, would that split run perfectly straight? A. No, it always runs to the weak point.

Q. And if the rift ran like this it would run this way. (indicating)? A. Yes, I think so.

Q. What have you to say with regard to rough stone reveived by you, would you call these dimension blocks which you got?

The Court: At Graham's yard?

Mr. McLanahan: Yes, sir.

Mr. Harley: He said he only received a few.

Mr. McLanahan: He said he received the doors.

(1250) Mr. Harley: Is that right?

The WITNESS: The door jamb; I didn't say all but I suppose they came on the car; I really couldn't say, but I suppose they came right from the car, but I didn't say all.

Q. (Mr. McLANAHAN) Did they have any lines on them? A. Only some of them.

Q. Would you call those stones without lines on them dimension blocks? A. Well, the majority of stones that come in from the quarries I have worked, when it comes in it has the marks or letter for that part which it is intended for.

Q. Well, would these correspond with the dimension stones which you were familiar with in other yards where you have worked? A. Yes, the stone did correspond.

Q. It corresponded with other dimension stones that you have gotten in other yards where you have worked? A. Yes, sir.

Q. It has been testified that the drilling of stone was not a job of the stone cutter but the business of the quarrymen; have you ever been in a stone cutting yard where they did not drill? A. No, sir.

Q. Every stone cutting yard you have been in they have drilled in, have they not? A. Yes, sir; more or less.

Q. And the stonecutters themselves drill? A. Yes, we plugged them sometimes ourselves.

Q. How about a bull set, is that a stone cutters tool or a quarryman's tool? A. They use it in both but we call it a granite cutter's tool; they do not belong to us.

Q. Did you ever see a stone cutting yard without a bull (1251) set in it? A. No, there is a face hammer which they also use and they always use one or the other.

Q. And those are granite cutter's tools? A. Yes, sir.

Q. After you were granite foreman in Washington, how was the work done over there on that building? Did the men that were on the job do a good day's work or did they loaf, or what?

(Objected to.)

Mr. McLANAHAN: I withdraw it.

CROSS EXAMINATION.

Q. (Mr. HARLEY) You were foreman on the Washington job and over here you did for Mr. Graham a very fine grade of work, did you not? A. I am not speaking of the very fine grade of work—I did the work that was given me. There were other men there.

Q. Didn't you do a very high grade of work? Isn't the carving around the door jambs a high class of work? A. Well, according to the work we are supposed to do I got a good class of work, yes.

Q. Have you any idea how many stones you worked on in Graham's yard there?

The WITNESS: How many stones?

Mr. HARLEY: Yes.

A. No, sir; I am not a mind reader—I presume I worked—I had been working for Mr. Malloy and when I came there Mr. Graham said I will give you a job, Jack, for jambs for you, he said, that is a good job for you, and I said, Yes, I think it is a good job; and another cutter and I worked on the whole business.

Q. Can you tell me how many stones you worked on? A. No, I couldn't tell you.

(1252) Q. Did you work on 20?

The WITNESS: While I was there?

Mr. HARLEY: Yes.

A. Oh, more than that.

Q. 25 or 30? A. Well, I could figure it out for you.

Q. You were there about 8 months? A. No, I was there August, September, October, November, December, January, February—down to March.

Q. Well, calling it 8 months, how many would you cut in that time? A. I never cut a stone through and through; I worked on the jambs and the bell stones; there was a stone with about 4 or 5 bells hanging on it—

Q. How do you spell "bell"? A. B-e-l-l—its the same way as they always have spelt it.

Q. Do they spell it the same as always? A. You can spell it anyway you like. I am not supposed to understand grammar.

Q. Well, can you figure now how many stones you worked on in that 8 months? A. I don't intend to try to figure that out; I got paid for the work that I did and that is all I had to do.

Q. Well, can't you tell about how many stones you cut? A. I have answered you, haven't I—

Mr. HARLEY: No, sir.

Mr. MCLANAHAN: I think this is a waste of time.

The WITNESS: Ifyou want to get the time that I started and finished and get the diagrams, that will tell you precisely.

The COURT: You must answer the question as well as you can. You say you were there a certain number of months; how many months were you there?

Mr. MCLANAHAN: About 8, I think.

(1253) Q. (The COURT) Eight? A. Yes, sir.

Q. Have you any idea how many stones you cut? A. The small jambs have from 6 to 7 and the large from 9 to 10, and then I worked on the lintels and then I was taken off and put on the modillions.

Q. You worked on the modillions? A. Yes, sir.

Q. (Mr. HARLEY) Most of these when they came to you would be lined up, wouldn't they? A. No, the modillions are not lined—yes, there would be a bed on it.

Q. How much work came to you that was not lined up at all on any side, if you please, sir?

The WITNESS: How much?

Mr. HARLEY: Yes.

A. Well, there were jambs that came to me that did not have any lines on them.

Q. Didn't the jambs usually have some lines on them? A. No, sir; quarry lines, that is all.

Q. How many of them came to you with the quarry lines alone, sir? A. I couldn't state..

Q. How many faces on the stone did you cut usually at Mr. Graham's yard, please sir?

The WITNESS: How many what?

Mr. HARLEY: How many faces?

A. Well, the jamb has three.

Q. The jamb has three, that is good; how many had the others? A. Well, the modillion, I suppose you term it, bottom and two sides, that is all.

Q. And how many on the others? A. The lintels had two.

(1254) Q. Weren't these stones from the machine that you worked on?

The WITNESS: The lintels?

Mr. HARLEY: Yes, all of them, outside of the door jambs? A. Yes.

Q. They all came from the machine outside of the door jambs? A. Yes, sir.

Q. And you are free from prejudice in this controversy, of course? A. Yes, sir; I am.

Q. You are not a close friend of Mr. Pirie's are you? A. Just a friend from working under him.

Q. You are just hardly acquainted with him, aren't you? A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. (Mr. MCLANAHAN) You say all but those for the jambs came from the machine. How many faces would the machine cut on them?

The WITNESS: It would do what?

Q. Would it cut more than one bed on them, that is the machine? A. *Would it cut more than one bed on them, that is the machine?* A. I just worked on the molding work on the lintels, and they put me back there on the work to be careful—

Q. But you said to Mr. Harley that the door jambs came in the rough all together? A. Yes.

Q. Then you said the other stones came to you after some machine work had been done on them; is that correct? A. Yes.

(1255) Q. How much machine work had been done on them, was it just cutting one bed or more than one bed? A. Well, the bottom of the lintel is supposed to show fine.

Q. Had the machine cut that on there before it came to you? A. Yes, sir.

Q. Had it cut any more than that on there? A. Well, it had to be roughed out.

Q. Had that been roughed out before it came to you? A. Yes, sir.

Q. And how about the modillions? A. There was nothing to rough out, the top bed was on—

Q. You did everything on the modillions except the top bed, then? A. Yes, sir.

Q. Did you ever see Mr. Pirie interfering with the men around there and keeping them from their work? A. Not to my knowledge; I had enough to do tending to my own business.

RE-CROSS EXAMINATION.

Q. (Mr. HARLEY) Did he ever talk to you during the work? A. No, sir.

Q. He never did in his life? A. No, sir; unless it was about a profile or something like that.

Q. What did he have to do with the profiles? A. Well, he might say to me to keep it hung up and not get it bent.

Q. But what did he have to do with it? What business was that of his? A. I guess it was for the benefit of the man to keep his stone correct.

Q. What had he to do with the man working for Mr. Graham? A. He did not interfere with me.

Q. Now, as a matter of fact, about these stones, hadn't (1256) every one of them been grooved out except the door jambs? A. I don't know, sir; I am only speaking about what I done.

Q. And you would not say? A. I would not say everything is grooved—is that what you mean?

Mr. HARLEY: That will do.

HUGH MCINTOSH, a witness produced on behalf of the plaintiffs, in rebuttal, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. MCLANAHAN:

Q. What is your business, Mr. McIntosh? A. Granite cutter.

Q. How long have you been a granite cutter? A. About 18 years.

Q. Where did you learn that trade? A. In Quincy, Mass.

Q. Where did you work at it? A. In Worcester, Boston, Portland and Bangor, Me., and different places through the country, and in Washington.

Q. Did you work here in Baltimore? A. Yes.

Q. Did you work for Mr. Graham while he was at work on this granite contract for the National Museum, South pavilion? A. Yes.

Q. Just when did you go to work for Mr. Graham at that time? A. Well, I went to work for Mr. Graham about the last of February or the 1st of March, 1907.

Q. How long did you stay there? A. About a year, I think, until the next March sometime, March, 1908.

(1257) Q. And that is when he stopped work on this particular job? A. Yes.

Q. Then where did you go? A. Then I went to Washington on the Museum building.

Q. Did you do any work in Washington in finishing up this granite stone on the Graham contract? A. When they started the job they put me to work on it.

Q. Did you keep at that work until that job was finished over there? A. Yes.

Q. Where are you working now? A. For Mr. Graham.

Q. Do you know what rotten stone is? A. I do not know as I can explain that to you. What do you mean by rotten?

Q. In evidence here it has been testified that rotten stone meant stone on which you would not get an edge or corner. Can you say whether any of the stone which came into your hands while you were working for Mr. Graham on this Bethel stone contract, was of that character that you could not get an edge or corner on? A. Oh, there is some stone, you know, which is a stone that lies on the top of the quarry and is a little brittle. I would not call that rotten but it is harder to get an edge or corner on than other stone.

Q. Did you have any stone that came to you on this contract that you did not get an edge or corner on? A. When I first started there I had a little trouble with the stone. The first stone I had trouble with was a stone with little scales—

Q. What do you mean by scales—about how big were they? A. About ¼" deep. The stone I got had a bed already on it, and when I put a line on it to top the first mould I found a (1258) scale there and I called the foreman's attention to it. He said that I would have to go down and take it up; after I went down and took it up when I got the line on again I seen another scale, I called his attention to it, and he said I would have to lower it down.

Q. What do you mean by a scale, a little seam? A. A little seam or riff. This is the light bead on top here and there was a scale in here (indicating) and it would not do to leave it in because when you got in back of the bead you would have to take it out. Then the foreman took me off of that stone the third time and he put me on two or three other stones. I cut two or three other stones.

Q. Did you have any trouble with these stones? A. No, sir. After I cut two or three of them he put me back on this one again and then I got it all right.

Q. You had no more trouble with it? A. No, sir.

Q. Did you have any more stone that came under your notice during the time you were working there that you had any trouble with this scale or keeping the edge on? A. None that I remember.

Q. It has been testified here that the stone that went over there in the building in Washington, a great deal of it, in the yard in Baltimore was rotten and that no Baltimore architect would accept it and that it was not fit to be put in a building. Did you see any stone like that over there to your knowledge, or here in Baltimore? A. I did not.

Q. Did you see the stone over in Washington? A. Yes.

Q. Did you see any stone like that, rotten and unfit to go in a building. Was any of the stone that you saw there rotten and unfit to go in a building, in your opinion? A. I did not take notice of any.

(1259) Q. How were the edges that went in the building cut, fine or rough? A. They were very good, I thought.

Q. Do you know what is meant by dimension stone? A. Yes.

Q. What is the meaning usually of that word? A. Well, it is stone quarried to get a certain size out of it, a certain size finished. The finished size is marked on it.

Q. It is a stone quarried to get a certain size out of it? A. Yes, the finished size of the stone in the rough.

Q. That is dimension stone? A. Yes.

Q. How many inches allowance, if any, do they make over and above the finished dimension of a stone—is there any fixed amount? A. I do not know of any; I could not say how much.

Q. You have worked in all these different stone yards, and is it cut down within an inch or two or sometimes three or four inches?

(Objected to as *to* leading.)

A. I do not know how much about that. Sometimes there is an inch, sometimes two or three and sometimes six and may be more.

Q. And you found that condition to exist throughout all these other stone yards where you have worked?

(Objected to as *to* leading.)

A. Yes.

Q. Would you say that this stone which came under your observation while you were working for Mr. Graham on this Bethel stone was dimension stone or not? A. They were marked dimension stone, yes, sir.

(1260) Q. What would you say comparing them with the average stone that you cut in these other yards that you have worked in. What would you say about them? How would they compare? A. The stone I cut three other men had it before I cut it. First they lined them up, then it would go to the machine and then another man squared it up. Then it was turned over to me to finish.

Q. You did not get the rough stock when it first came in? A. No, sir, very little of it.

Q. How did the little bit appear? Did you notice any excessive roughness on it? A. No, sir, it was just like what I told you about the other, these scales when I first started.

Q. How about drilling, is that drill a stonecutter's tool or a quarryman's tool? A. It did not belong to us, the drills belonged to the company.

Q. Do they use it in a stone cutting yard or only in a quarry? A. We used them sometimes for plugging and sometimes for slabbing.

Q. Are they used in the stone cutting yards that you have had experience with? A. Yes.

Q. How about bull sets? A. Yes, we used that in a stone yard.

Q. There has been some testimony in this case that Mr. Pirie went around and interfered with the workmen of Mr. Graham while they were on this job. Did he ever interfere with you? A. No, sir, I had to go to him often and ask him questions about the stone and he explained it to me.

Q. Why did you have to go to Mr. Pirie about the stone? A. Sometimes I would ask the foreman about it and he *and he* (1261) would tell me to see Mr. Pirie and sometimes I would go up to the office and see him. I wanted to be sure that I was right.

Q. Who was the foreman that you spoke to about this? A. Mr. Walter Graham.

CROSS EXAMINATION.

By Mr. HARLEY:

Q. My understanding is when you got the stone the rule was that it had been machined down? A. Yes.

Q. You have spoken of drills, and you have said that they were used for plugging and slabbing? A. Yes, sir.

Q. My understanding is that the drills are used for plugging and slabbing and not for cutting? A. And not for cutting.

HENRY A. EASTMAN, a witness produced in rebuttal, having been duly sworn, testified on behalf of the plaintiffs, as follows:

DIRECT EXAMINATION.

By Mr. MCLANAHAN:

Q. What is your business? A. Quarryman.

Q. Where do you live? A. Bethel, Vermont.

Q. What do you do there? A. I am foreman for the Ellis Granite Company.

Q. What quarry does that operate up there? A. What is called the Ellis Granite Quarry in Bethel.

Q. Is that the quarry which supplied this Bethel granite for the south pavilion we have been talking about in this case? A. It is.

(1262) Q. You are foreman of that quarry? A. Yes.

Q. How long have you been a quarryman? A. About 30 years.

Q. It has been testified by the defense in this case that the stones were excessively rough and bad patterns; will you state what you know about these stones that were sent down on this Bethel contract? A. Well, there was some rough stone sent and some very good ones. There was a very good lot of stones, the best that ever came from the Bethel quarries.

Q. The best that ever came from the Bethel quarries as a lot? A. Yes.

Q. Do you know what a dimension block is? A. I think so.

Q. Did you ever hear of a net dimension block? A. In regard to quarrying, I never did.

Q. But you know what a dimension stone is? A. Yes.

Q. What does a dimension stone mean? A. A dimension stone, as I understand it, is a block quarried large enough to get the dimension out of it that is given, the three dimensions that is given out of the stone.

Q. A stone large enough so you can get that cube stone out of it? A. Yes.

Q. What would you say as to the allowance over and above the actual amount necessary to make the actual stone? A. That depends on the stone. Thin ashlar about 2″ on each dimension ought to be sufficient.

Q. How about a cornice stone or a column drum? A. Well, a column drum is cut on four sides. That would be from 4 to 6″ on a stone that was nearly 3′ thick.

(1263) Q. And does it make any difference how many sides the stone is to be finished up on as to whether you would make more allowance or less allowance on it? A. It does.

Q. Does a stone which is to be finished full and fine on four sides take more allowance than a stone that is to be finished on one side only? A. It does.

Q. Will you tell us just why—first of all answer this if you can: Is there any difference between different quarries as to the allowance that you have to make on the stone?

Mr. Gaither: I object to that until he shows what quarry he is comparing it with.

Q. (Mr. McLanahan) What other quarries have you been in, Mr. Eastman? A. I have been in the Woodrey quarries in Woodrey, Vermont, the Barre quarries in Barre, Vermont, in the Keene quarries in Keene, N. H., and in quarries in New

Bedford, Mass., and quarries in Canada and different small quarries in New Hampshire and Vermont.

Q. You own a quarry of your own, do you not? A. I do.

Q. Now, can you tell us whether different quarries make a difference as to how much of an allowance you should make for this dimension block that you speak of? A. There is a difference in the different quarries.

Q. Why is there that difference? A. Some stones split smooth, as we call it, and some split rough and ragged.

Q. Is there a difference in the way in which the stone lies in the quarry? Does that make any difference in the allow-
(1264) ance? A. It does.

Q. How does it make a difference? A. The difference, from what we call the phrase we use is the run of the stone.

Q. Explain just what you mean by the run of the stone. Take, for instance, this is a block of stone here (indicating) that you want to get out of your Bethel quarry; how does your Bethel lie? A. The Bethel quarry lies on an angle like that (indicating).

Q. This is the top (indicating)? A. Yes, and we put a line to split that stone down here, drive it down,—supposing that sheet is 2'6"—you put a line up here to break that, and it would run at least 6" this way from square.

Q. You put the plugs in to cut down this way (indicating)? A. Yes.

Q. And the split will always run under? A. Yes.

Q. If you put the plugs in parallel with the top of that sheet (indicating) the split will run diagonally after you get the block in there? A. Yes.

Q. Why? A. The riff of the stone is level and it runs toward the riff.

Q. Suppose you put plug holes up here (indicating) and you go under 6" say, of course the further you went down, the further the split would go? A. Yes.

Q. The larger the stone you want the further back you take it this way to get that stone? A. Yes.

Q. You say that the larger the stone that you are going to get out, the further under will the split come? A. Sure it will.

(1265) The COURT: Let him testify.

Q. Now, say we begin of course at the bottom, say we split out the bottom, that will mean that the plug will run out like that (indicating)? A. Yes.

Q. And then you come to the top and put the plug holes in, and how will that run? A. About 3" to the foot and square with the top.

Q. Run at an angle? A. Yes.

Q. Suppose you had a block with the dimensions given to you, and you had to split it down, could you take those lines and lay them within 2" on that Bethel quarry and get a block or rough stone out, out of which you could cut the finished stone? A. I could not.

Q. Unless it was a stone very thin? A. Unless it was very thin.

Q. Do you recognize these pictures of the quarry? A. I do.

Q. They are the pictures of it, are they? A. Yes.

Q. Now, take a quarry that lies on a level, the top of the stone lies parallel with the riff, how about the lines of that stone, do you have to make as much allowance? A. No, you do not have to make as much allowance.

Q. Now, you said a net dimension block is such a block of stone as that you can get the finished dimension of the stone out of it? A. As I understand it.

Q. I meant dimension block, not net dimension block? A. As I understand it.

Q. Now, can you tell us what would be the fair average weight on the Bethel quarry stone for dimension stone per (1266) cubic foot, of finished stone? A. We call it 250 pounds to the cubic foot.

Q. Is that a fair weight from the Bethel quarry? A. It is.

Q. *What* that be true of every quarry that you have had experience with? A. No, I do not think it would.

Q. Would some quarries be less than that? A. The Keen quarry I think would go less than that.

Q. Why? A. Because the stone splits better and splits truer and not as rough.

Q. What have you to say with regard to the stone quarried at your quarries? When did you begin quarrying stone on this Bethel contract, if you recall? A. In the last of December, I think, 1906.

Q. And I think the testimony shows that the first car load went out on January 17th, 1907, and then another car load went out on April 22nd, 1907, if I remember correctly that was the date that the second car load went out. Now, what were you doing all that time between January 17th, 1907, and April 22nd, 1907? A. We were quarrying on other jobs and on this job.

Q. What were the other jobs? A. They were part of the same building, I think.

Q. You were doing work on this stone, on this job too, were you not? A. Yes.

Q. Why was it the stone wasn't sent down? A. Because we couldn't get the cars to load the stone on to.

Q. Can you tell us how long that condition existed? A. All the winter and spring and during the summer until, about fall.

(1267) Q. And then you got some cars? I notice that some came in? A. Yes.

Q. Did you or did you not always have more stone there than cars to take the stone away up until the fall of 1907? A. We always had stone on hand.

Q. Did you or did you not always have more stone than cars to take it away? A. Yes.

Q. Did you or not have more cars than stone? A. We never had.

Q. You never had up to that time? A. No, sir.

Cross Examination.

By Mr. Gaither:

Q. Mr. Eastman, which did you say had the most additional cubic inches on it, the small stone or the big stone? A. The big stone.

Q. And it is all depended on the way you tried to quarry it in the quarry, as to how big a stone you take out, is that right? A. I do not understand your question.

Q. You say that on account of the trouble you had in your quarry that you were not certain what kind of a block you would get out, for instance, how big it would be? A. You are not certain, no.

Q. And you might get out a stone weighing ten tons, when you wanted a stone weighing five? A. Hardly that.

Q. What would be the difference? A. If you wanted a stone weighing a ton, you would try to get it out.

Q. But you cannot answer how big a stone you might get would be in trying to quarry for a stone that weighed 15 tons, (1268) or ten tons? A. If we wanted ten tons we might get a stone weighing 15 tons but we would finish it up—

Q. Ah, then you did finish it up? A. Yes.

Q. What did you do? A. Drilled it down.

Q. To a proper size? A. Yes.

Q. And you knew you had to drill the stone down to get it to a proper dimension size? A. We did.

Q. Did you drill this stone down to 2″? A. No, sir.

Q. Why? A. Because that is not a proper size for big stones.

Q. Did you drill the small stone down to 2″? A. Some of them we did.

Q. And some of them you did not? A. I could not say.

Q. Did you drill the big stone down? A. I do not think we did to 2".

Q. Did you drill it down to 3"? A. I do not think we did, the biggest ones.

Q. How much did you drill them down? A. Probably to 5.

Q. And how many of the stones did you drill down? A. I could not say.

Q. Did you give the orders yourself to drill them down? A. I looked right after them to see that they got down to a reasonable size.

Q. What size? A. I could not answer that question.

Q. You cannot tell us what size you ordered your men to (1269) get them down to? A. To a reasonable size for the dimensions.

Q. And that is the best answer you can make to that question? A. It is.

Q. And you did not order them to bring the ashlar down to "", did you? A. The ashlar, I think some of them was brought to 2".

Q. Did you order it? A. I did.

Q. Did you ever order it on all three sides? A. I could not say.

Q. You could not say? A. No, sir.

Mr. GAITHER: Now, then gentlemen, give me Mr. Bailey's book.

(Book handed to Mr. Gaither.)

Q. Did you measure any of those stones before you shipped them (indicating)? A. I did.

Q. Did you measure any of the stones of the last shipments in February or March? A. I could not say.

Q. Could you swear whether you did or not? A. I could not say.

Q. Did you ever measure the columns? A. I did.

Q. Well, now, look at that invoice and state what is the size of that stone S. P. Z, 21-8?

Mr. MCLANAHAN: What kind of stone is that, Mr. Gaither? You were talking about a column, is that a column?

Mr. GAITHER: It is not a column. I am just asking him about this one (indicating).

Q. How big is that? A. 8, 3, 4, 6, x 4.

(1270) Q. Now, then, did you measure that stone? A. I could not say I did.

Q. Suppose I told you that stone was 211′ 10″, cubic feet when it got here, what would you say to that? A. I do not think it was.

Q. You do not think it was? A. No, sir.

Q. Let us take another one—

Mr. McLanahan: Mr. Gaither you are asking him questions from a book that was never put in evidence.

Mr. Gaither: I know. I want to know whether he knows anything about it.

Q. What was the size of that column stone according to that invoice of Mr. Pirie's? A. Which one do you mean?

Q. The top one? A. All right.

Q. The big column, what was the size of that column? A. 7′ 9½″, 7′ 8½″ x 2′ 8″.

Q. What was the size of that stone according to the net dimension? What would the quarried size be? A. Probably it was 8′ x 8′ 2″ x 2′ 11″ or 3′, something like that.

Q. Suppose I told you it was 3′ 11″, what would you say about that? A. I do not think it was.

Q. The first of that stone you said would be how much? A. 8′ x 8′ 2″, x 2′ 11″ or 3′.

Q. You are right on the first two pretty closed, but the last one was 3′ 11″.

Mr. McLanahan: I object to Mr. Gaither's remark.

Mr. Gaither: All right, that can come out.

Q. Do you know anything about the measurments of that (1271) particular column stone when it left your yard? A. I know that the Inspector, Mr. Bailey, would not have allowed the shipping of that stone if it was over the dimension I just mentioned.

Q. Now, you swear that the dimension stones in your quarry would run 250 pounds to the cubic foot if of the right dimension? A. Yes.

Q. Would that be for a big stone or small stone? A. Take them right through the whole job.

Q. Which would it be the most on, the small ones or the big ones? Which would be greatest weight, on the small stone or the big stones? A. How large would you call a large one, 30′?

Q. You just tell what you would call a large one. I am examining you? A. I should think there were more feet in the small stones than in the big ones.

Q. Therefore there would be more weight on the same number of cubic feet of small stones than on the same number of cubic feet of the large stones? A. Yes.

Q. And you treated all the stones that came down here alike, or as near alike as you could? A. We did.

Q. And you shipped them, all you could, the same way? A. Yes.

Q. And you made all as near the dimension size as you could? A. Dimension stone, yes, sir.

Q. Mr. GAITHER: Give me, please, gentlemen, invoices 78 and 79?

Q. Look at that car and state whether you consider them large stones or average stones in size? How many stones are (1272) there? A. 10 A.

Q. What is the biggest stone? A. There are nine stones there.

Q. What is the biggest and what is the smallest? A. A 42-foot stone is the largest and a 13′ 7″ is the smallest.

Q. How many cubic feet are there there all together, according to that? A. 300′ 1″.

Q. If I told you that car weighed 50,000 lbs. how many pounds is that per cubic foot? A. I could not tell you that.

Q. What does Mr. Bailey's book show on here? A. 167.

Q. Look at 79 and state how many stones there are on that? A. 18.

Q. How many small ones and how many big ones? A. Nearly all small ones.

Q. What do they total up, how many cubic feet? A. 300.

Q. 300? A. Yes.

Q. How much average weight to the cubic foot does Mr. Bailey make that? A. 179½.

Q. Please look at No. 80 and state whether they are big or small stones on that load and how many there are? A. These would be called large stones.

Q. How many were there? A. 8.

Q. And how much does Mr. Bailey make out the average (1273) of those stones per cubic foot? A. 196.

Q. That was a good deal larger than on the small stones? A. Yes, the small stones was 8″—

Q. Suppose you added on that, what would it make the difference? A. It would make much more.

Q. On some of the small stones? A. Yes, on the 8 size.

Q. Now, look at the 81st load and state how many stones there are in that? A. 31.

Q. 31? A. Yes.

Q. How many small and how many big stones are in there? A. One large stone and two full fair size.

Q. How about the 11′ stone? How many stones are in there that are under the foot, how many dimensions? A. 22 of them.

Q. How much does Mr. Bailey make the average of those stones per cubic foot? A. 180.

Q. Now, Mr. Eastman, when you are getting out the stone that you are going to set back in the wall, there is no necessity for that to be absolutely correct, is there? A. Not on some jobs; but on some jobs it is necessary and it is required to be.

Q. But where that is going to be sized up with stone and concrete and brick, does it make any difference whether it is 1″ more or less? A. Some Inspectors call for it full and some say it is all right.

Q. So that that dimension of depth, which is the second dimension, isn't an important as the other two dimensions on (1274) ordinary stone, is it? A. It is not on ordinary stone.

Q. On ordinary stone, dimension stone, the height and length are the two important dimensions? A. Yes.

Q. They are the ones to be cut? A. Yes, and—

Q. And it is according to what the Inspector says? A. On some jobs.

Q. Then there is nothing to be done on that expect to shape down the front, is there? A. On some stones.

Q. And on that dimension here is nothing to be done on the stone, except cut down the front? A. In some cases there is not, but in some cases it is required to be rough on the back.

Q. But where there isn't any requirement to be roughed on the back, that is all that is required to be done? A. That is all.

Re-Direct Examination.

By Mr. McLanahan:

Q. And when there is no requirement that it should be roughed on the back, you allow the 2″? A. Yes.

Q. Mr. Gaither has asked you about these stones in these 78, 79 and 80th shipments, in the Z courses, what kind of stones would you call those on the corners? A. Headers.

Q. Did you take the back out of those headers? A. We did.

Q. At whose direction did you take off that back of the stone and cut it out? A. At the direction of the Inspector, Mr. Bailey.

Q. And when that stone went on these invoices, what was (1275) the cube taken of that stone? Was it taken with the back out of it or taken with the over all dimensions? A. With the over all dimensions.

Q. As if it was a solid block? A. Yes.

Q. And yet you cut it out and sent it down with the back cut out of it? A. Yes.

Q. How about this under cut stone here (indicating)? A. We did not plug that up. When the stone is shaped in such a manner we had to let it go in that way.

Q. But you did cut out the headers? A. Yes.

Q. Does that apply to all the headers throughout the job? A. Yes.

Q. And that would take sometimes more than half the cubic contents of the stone out and relieve the freight that much, would it not? A. It would.

JOHN Q. SHEEHY, a witness recalled on behalf of the plaintiffs in rebuttal, having heretofore been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. MCLANAHAN:

Q. Mr. Sheehy, Mr. Gaither asked you yesterday to identify two letters which you put in evidence from Mr. Green to the Thompson-Starrett Company. Will you tell us just what you know about these letters? First of all, tell us whether Mr. Green was up at the quarry from about the time that these letters were written, in Bethel, any time after, say Jan- (1276) uary 1st, 1907, to the end of the job? A. He was not.

Q. Where did he get his information of conditions at the quarry from, do you know? A. Well, I do not know that he had any particular information about it. It is the general policy in dealing with the contractors to urge them on with the work at the beginning to keep them down to it as close as possible.

Mr. GAITHER: Is this rebuttal, your Honor, when he is asked to identify certain letters and then goes in to another explanation.

The COURT: I suppose it is explanatory of his answer.

Mr. GAITHER: It is all right. We do not care about that.

Mr. MCLANAHAN: You say it is the custom in your office to jog up the contractors right straight along?

A. It is.

Q. Do you know whether or not those two letters were written for that purpose? A. That is the purpose for which they were written. We are writing letters to other contractors now for the same purpose.

Q. To jog them along? A. Yes.

Q. And Mr. Green personally did not know whether or not Thompson-Starrett had quarried that stone, did he?

(Objected to as leading.)

A. No, sir, he did not.

Q. Will you look at the letter that I hand you and state from whom it was written, and to whom, if you know? A. From the Thompson-Starrett Company to Mr. Green.

Q. You say this is from the Thompson-Starrett Company to Mr. Green, and it was received in your office, was it? A. It was.

Q. "Thompson-Starrett Company, Building Construction
New York, Chicago, Northfield, Vermont. Granite for Na-
(1277) tional Museum Bldg., July 23, 1907.

"Mr. Bernard R. Green,
Superintendent of Construction,
Washington, D. C.

Dear Sir:

As we wrote you some weeks ago in regard to the quarrying to stone for shipment to Mr. Graham in Baltimore, the fact that we have very few sizes in the quarry is reducing our output on this order very greatly. The summer is more than half gone and the quarry, for want of sizes, is running about half capacity. We have always found that this quarry is one in which it is not possible to obtain sizes easily, and it is not possible to take a quarry order and get it out on short notice. We believe that there is going to be severe complaint later on, on the score of our failure to deliver stone to Mr. Graham, and hope that you can do something to supply us with the sizes for the remainder of the work.

We wish to say a word also in regard to the criticism by Mr. Pirie of the patterns that we are shipping to Mr. Graham.

On the ground that Mr. Graham took this job low and is losing money, it seems to be put up to us that we should rough the patterns down to a net cubic size and thereby save him money both on account of the freight and cutting. We are using every endeavor to give Mr. Graham the best patterns that our quarry will produce, but cannot assume the risk or stand the expense of plugging off good safe patterns that we know will make the stone for which they are quarried. Generally speaking Mr. Graham has received better patterns in the long run, that we quarry for ourselves as we have tried to help him as much as possible in this matter, but we cannot see how it can be expected of us to give him patterns better than the (1278) average produced by the quarry or better than we undertake to quarry for our own use. The contention that he has to pay freight on them has no *h*earing on this point in view of the fact that we have also to pay freight from the quarry to the main line of the railroad in Bethel and from Bethel to Northfield on our own rough stock. This very item is one of the elements that went to make our price for the work high, and Mr. Graham had ample time and opportunity to ascertain the conditions before he bid on the work.

Mr. Bailey at the present time is withholding his O. K. from a very considerable number of stone on this score and is insisting on our plugging off good, safe, patterns at the risk of spoiling them and at very considerable expense to us. We would add in this matter that during the past two years we have shipped to other contractors in other parts of the country a quantity of stone equivalent to all that Mr. Graham will receive from us, and have never before had a serious complaint as to the quality of the patterns.

It should also be taken into consideration that Mr. Graham has to date saved for his own use 185 cubic feet of granite. This seems to us a very large saving and should go a long way to offset any complaints that he may have.

We trust that the above will appear to you a fair statement of our side of this question, and that you can assist in expediting the marking of those stones, this especially in view of the fact that we have received a large consignment of cars for shipment to Baltimore, and there are between 20 and 30 carloads of stone in the quarry ready for shipment which Mr. Bailey has not yet approved.

Yours very respectfully,

THOMPSON-STARRETT COMPANY.
By G. STARRETT."

(1279) That letter was received by your office? A. It was.

Mr. McLANAHAN: We would like to have letter from Mr. Green to Mr. Graham of February 25th, 1907.

Mr. HARLEY: Is it in evidence?

Mr. McLANAHAN: I do not think it is in evidence.

Mr. HARLEY: We haven't it.

Mr. McLANAHAN: Then we will use this copy from the letter book.

Q. Mr. Sheehy, will you look at that copy and state what you know about that letter, whether it was sent out, if you know, from your office? A. This letter is dated February 25th, 1907, addressed to Mr. Graham by Mr. Green; it was sent out; I wrote it myself from Mr. Green's dictation; it bears Mr. Green's signature.

Q. You wrote it yourself from Mr. Green's dictation, and it bears his signature? A. That is correct.

Mr. McLANAHAN: I will read the letter.

Washington, D. C., February 25, 1907.

"Mr. Frank F. Graham,
Calhoun St. & B. & O. R. R.,
Baltimore, Md.

Sir:

I am enclosing herewith a tracing paper full size profile of the architrave or "lintel" stones of the main portico for the National Museum building, showing where a vertical joint may be located dividing the stones in two parallel courses front and rear. This relates only to the 5 lintels between the 6 columns in the front of the portico. The 2 return architraves, one at each end of the portico, will be in single stones, and so (1280) will be all of the architrave stones of the interior of the portico behind the front columns. This is partly in answer to your letter of the 13th instant. You will notice that, instead of splitting the architrave into two courses as you suggested, it is really made in one course with a front and rear stone, and the rear stone will be practically the same height as the front stone. Notice that the new joint must be very close and fine.

As to the extension of the main cornice on the two wings, which you asked to be allowed to cut in one course instead of two, I have no objection providing the quarry people will furnish the required stock. This you may perhaps arrange through the Inspector.

Yours very respectfully,

BERNARD R. GREEN,
Superintendent of Construction."

Do you know whether or not this letter contains the information about the changes in the lintel stones spoken of by Mr. Mason—you heard his testimony yesterday, did you not? A. I did.

Q. As to the information required on setting plan No. 8 before he could make it? A. That was the information.

Q. This letter contains the information? A. It does.

Q. You had charge of making up these vouchers of payment to Mr. Graham, did you not? A. I did.

Q. Can you tell us what kind of stone these stones are in here (indicating)? A. Headers.

Q. Now, from these blue prints, it appears that there is a piece taken out of the back of these stones? A. That is cor-
(1281) rect.

Q. Now, was Mr. Graham paid for the actual amount of stone in that—I mean was he allowed for the actual amount of stone in that stone or was he allowed for the total dimensions over all? A. Total dimensions as if the stone was a perfect cube, or a rectangular cube rather.

CROSS EXAMINATION.

By Mr. HARLEY:

Q. Do you mean, Mr. Sheehy, that you allowed for the jointing, is that it? A. No. It isn't customary in figuring stone work to allow for joints.

Q. As a matter of fact Mr. Sheehy, did I understand you to say when you were on the stand before that you never made any of those calculations at all as to the cubic feet, is that correct or not? A. I checked all the payments that went out to Mr. Graham.

Q. In the money? A. In the money, and I saw that the total cubic feet, as made up from the invoices, was correct, and I know from my experience of 15 years in the office that the figuring of stones is done by the three dimensions without

regard to what may have been knocked out of the backs of headers.

Q. You know that these computations in these invoices are correct, do you? A. Not these particular computations in these invoices, no.

Q. I think that you just said that you checked them up. I am talking about the Graham invoices to your office? A. I checked the total, as I testified to, of each invoice sent to me by Mr. Freas in red on Mr. Graham's invoices.

Q. And there were 69 of them? A. 69, and I added (1282) them up.

Q. Did you make the calculations to verify what Mr. Freas had done? A. I did not make any individual calculations.

Q. You simply took Mr. Freas' calculations? A. Yes.

Q. Then what you told his Honor when you were on the stand before is correct, that you never made those calculations, that you relied on Mr. Freas' calculations? A. It is correct.

Evidence concluded.

(1283) The case was here closed, the foregoing being in substance the entire testimony.

The following prayers of the plaintiff were then granted:

PLAINTIFF'S 2 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the first plea of either of the defendants.

Granted.

PLAINTIFF'S 3 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the second plea of either of the defendants.

Granted.

PLAINTIFF'S 4 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the fifth plea of either of the defendants.

Granted.

PLAINTIFF'S 5 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the sixth plea of either of the defendants.

Granted.

PLAINTIFF'S 8 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the ninth plea of either of the defendants.

Granted.

PLAINTIFF'S 9 PRAYER.

(1284)

The Court instructs the jury that there is no evidence sufficient in law to sustain the tenth plea of either of the defendants.

Granted.

PLAINTIFF'S 10 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the eleventh plea of either of the defendants.

Granted.

PLAINTIFF'S 13 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the fifteenth plea of the defendant, The Title Guaranty & Surety Company.

Granted.

PLAINTIFF'S 19 PRAYER (as amended by the Court.)

The plaintiff, the United States of America, prays the Court to instruct the jury that if they find for the plaintiff, the United States of America, in this case, they are to allow as damages the difference between what they may find to have been the reasonable and necessary cost to the plaintiff, the United States of America, for transporting, cutting and delivering the granite mentioned in this case at the south pavilion of the National Museum building in Washington, District of Columbia, and the amount specified in the contract offered in evidence in this case to be paid by the United States to the defendant, Frank F. Graham, for so transporting, cutting and delivering the said granite, the sum allowed, however, not to
(1285) exceed the penalty of the bond sued on in this case, namely, fifty thousand dollars, with interest, in the discretion of the jury, from May 25, 1909.

Granted.

The defendants submitted the following prayers, each and all of which were refused:

to work profitably in said yards; and that said Graham thereupon ceased to work on said granite; then, the jury are instructed that said Graham was justified in so doing; and that under the pleadings in this case, the verdict of the jury must be for the defendants as to the claim of the United States.

Refused.

Defendants' Prayer No. 6.

That according to the true construction of the contract of October 23, 1906, and the specifications constituting a part thereof, the defendant Graham was obliged to furnish setting plans, prepared, lettered and numbered as may be directed by the Superintendent of Construction, and said Graham was obliged to submit such setting plans to said Superintendent of Construction not less than one month prior to the commencement by said Graham of the work on the cutting of the stones represented in such setting plans; and the said contract and specifications do not provide for the furnishing of setting plans or copies thereof to the Quarry at or near Bethel, Vermont.

Refused.

Defendants' Prayer No. 7.

That the receipts given by the defendant Graham from (1289) time to time for amounts received from the Superintendent of Construction on progress payments are not conclusive evidence of the respective amounts due at the time of such payments; and the jury are to judge from all the evidence whether such payments were all that the progress of the work fairly and reasonably warranted at the time of such payments.

Refused.

Defendants' Prayer No. 8.

The general instructions and conditions, constituting a part of the contract of October 23, 1906, offered in evidence, provide:

"Payments will be made from time to time as the progress of the work may warrant. A percentage of ten *per centum* will be reserved from each payment until the whole of the cut granite called for by the annexed contract shall have been satisfactorily delivered and accepted;" and the jury are instructed that under this provision, the defendant Graham was entitled to ninety per cent. of such payments from time to time as the progress of the work fairly and reasonably warranted; and the

jury are the exclusive judges under all the evidence in this case as to what payments the progress of the work from time to time did fairly and reasonably warrant.

Refused.

Defendants' Prayer No. 9.

In no event can the United States charge against the contract of October 23, 1906, more than the fair and reasonable value of completing the work mentioned in said contract; and the jury are the exclusive judges as to what is fair and reason-
(1290) able under the evidence in this case; and if the jury find from the evidence that the fair and reasonable value of the completion of the work mentioned in said contract, should not have exceeded the contract price of one hundred and forty-nine thousand dollars ($149,000) less the sum of fifty-nine thousand four hundred dollars ($59,400) paid to said Graham; then, the verdict of the jury must be for the defendants.

Refused.

Defendants' Prayer No. 10.

No evidence has been offered legally sufficient to prove the fair and reasonable cost of completing the work mentioned in the contract of October 23, 1906, offered in evidence, in excess of the price in said contract stipulated to be paid to the defendant Graham for the completion of said contract; and the verdict of the jury must, therefore, be for the defendants.

Refused.

Defendants' Prayer No. 11.

That according to the undisputed evidence in this case, the United States has blended and failed to segregate the cost of the completion of the work under contract of October 23, 1906, and the cost of completion of the work under the unexecuted supplemental contract dated March 6, 1908, offered in evidence; and under the pleadings in this case, the verdict of the jury must, therefore, be for the defendants.

Refused.

Defendants' Prayer No. 11½.

If the jury find from the evidence that the Superintendent of Construction did not act in good faith in annulling the contract offered in evidence; then, the verdict of the jury must be for the defendants.

Refused.

DEFENDANTS' PRAYER NO. 12.

(1291) If the jury shall find from the evidence that on the eighteenth day of March, 1908, the Superintendent of Construction, Bernard R. Green, knew that large quantities of the granite stone referred to in the contract of October 23, 1906, had not been furnished to the defendant Frank F. Graham, without unnecessary delay, and that only about eleven thousand cubic feet of the said granite had been furnished to said defendant on or before October 1, 1907, and that subsequently during the months of December, 1907, January, 1908, and February, 1908, great quantities of said granite had been shipped by the agents and servants of said Superintendent of Construction to the said Graham; and that such shipments on account of the season of the year could not be handled and cut by the said Graham without great additional expense, and that on account of said large shipments the stone-cutting yard of the said Graham had been so overcrowded that the work of cutting stone at that period of the year could not be profitably carried on by the said Graham, and that said Graham was suffering and would suffer serious financial losses on account of said overcrowding; and shall further find from the evidence that the said Superintendent of Construction knew that large quantities of said granite so furnished by his agents were not in net dimension blocks; and that on account of the sizes and shapes of said blocks, said Graham was and would be obliged to pay (1292) considerable sums of money for the freight on the additional stone in said blocks, and for the additional cost of cutting said stone; and shall further find from the evidence that the said Graham, through his attorney, informed the said Superintendent of Construction on or about March 15, 1908, that he had stopped work on the granite work of the south pavilion on account of the damage which, he, Graham, had suffered by reason of the manner in which this matter had been gone on with on the part of the United States and its agents, and that he was ready amicably to adjust the matter on a fair and equitable basis between the parties; and shall further find from the evidence that said Superintendent of Construction told the Secretary of the Smithsonian Institution at or about the time at which he requested the said Secretary to sanction the annulment of said contract that the said Graham had thrown up his contract; then the jury are instructed that the said Superintendent of Construction did not act in good faith in seeking to annul said contract with the sanction of the said Secretary as representing the Regents of the Smithsonian Institution on March 18, 1908; and that under the pleadings, their verdict must be for the defendants.

Refused.

DEFENDANTS' PRAYER NO. 13.

That according to the undisputed evidence, the work mentioned in the contract of October 23, 1906, was materially altered in that it was completed according to the following supplemental contract:

"SUPPLEMENTAL CONTRACT,

Made and concluded this sixth day of March, nineteen hundred and eight, by and between Bernard R. Green, Super-
(1293) tendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, State of Maryland, of the second part:

Witnesseth, that whereas, a contract has heretofore been entered into between the parties hereto on the twenty-third day of Octobr, nineteen hundred and six, for transportation from quarry, cutting, furnishing, and delivering at the site of the new building for the National Museum, in Washington, District of Columbia, the cut granite required for the south pavilion above the first floor level of the said building, for the gross sum of one hundred forty-nine thousand dollars ($149,000.00), and whereas, by reason of changes found desirable in the details of the design of the said cut granite by which the diameter of the drum of the dome is increased from 80 feet to 84 feet, the breadth of the column and pilaster caps increased to suit the sculptor's models, certain cornice courses increased in depth for greater stability of the wall, and panel stones of granite inserted in the U course, the said party of the first part has agreed and by these presents does agree, with the said party of the second part, for himself, his heirs, executors, and administrators, for and in consideration of the said changes, to pay to the party of the second part the sum of four thousand dollars ($4,000.00) additional to the consideration in the said contract of October 23, 1906, increasing the sum total of the said contract to one hundred and fifty-three thousand dollars ($153,000.00).

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.
(1294)

_____,
Superintendent of Construction.

Witnesses:

_____, [Seal]

_____,

_____,

(Executed in triplicate.)

The Title Guaranty & Surety Co. of Scranton, Pa., the surety on the bond attached to the contract of October 23, 1906, between Bernard R. Green, Superintendent of Construction, and Frank F. Graham, for furnishing and delivering cut granite for the south pavilion of the building for the National Museum, which bond is dated the twenty-sixth day of October, 1906, does hereby consent to the change in said contract above named, and does hereby agree that said change shall not affect its liability on said bond in any manner whatever.

In witness whereof, the said The Title Guaranty & Surety Co. of Scranton, Pa., has placed its hand and caused its seal to be attached hereto this day of March, nineteen hundred and eight.

Approved , 1908, for the Regents of the Smithsonian Institution.

By ——————, Secretary."

And that said contract was never executed; and that the changes mentioned therein were never assented to by The Title Guaranty & Surety Company; and the verdict of the jury, under the pleadings in this case, must, therefore, be for the defendants.

Refused.

DEFENDANTS' PRAYER NO. 14.

That according to the undisputed evidence in this case, the work under the contract of October 23, 1906, was materially altered; and under the pleadings in this case, the verdict of the jury must be for the defendants.

Refused.

DEFENDANTS' PRAYER NO. 15.

(1295) Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the plaintiff to recover; and the verdict of the jury must, therefore, be for the defendants.

Refused.

DEFENDANTS' PRAYER NO. 16.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the United States to recover against either of the defendants; and the verdict of the jury must, therefore, be for said defendants.

Refused.

DEFENDANTS' PRAYER NO. 17.

No evidence has been offered legally sufficient to prove that the Superintendent of Construction annulled the contract, offered in evidence, with the sanction of the Regents of the Smithsonian Institution; and under the pleadings in this case the verdict of the jury must, therefore, be for the defendants.

Refused.

DEFENDANTS' PRAYER NO. 18.

That according to the undisputed evidence, the work mentioned in the contract of October 23, 1906, was materially altered in that it was completed according to the following supplemental contract:

"SUPPLEMENTAL CONTRACT,

Made and concluded this sixth day of March, nineteen hundred and eight, by and between Bernard R. Green, Super-
(1296) tendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, State of Maryland, of the second part:

Witnesseth, that whereas, a contract has heretofore been entered into between the parties hereto on the twenty-third day of October, nineteen hundred and six, for transporting from quarry, cutting, furnishing, and delivering at the site of the new building for the National Museum, in Washington, District of Columbia, the cut granite required for the south pavilion above the first floor level of the said building, for the gross sum of one hundred forty-nine thousand dollars ($149,000.00), and whereas, by reason of changes found desirable in the details of the design of the said cut granite by which the diameter of the drum of the dome is increased from 80 feet to 84 feet, the breadth of the column and pilaster caps increased to suit the sculptor's models, certain cornice courses increased in depth for greater stability of the wall, and panel stones of granite inserted in the U course, the said party of the first part has agreed and by these presents does agree, with the said party of the second part, for himself, his heirs, executors, and administrators, for and in consideration of the said changes, to pay to the party of the second part the sum of four thousand dollars ($4,000.00) additional to the consideration in the said contract of October 23, 1906, increasing the sum total of the said contract to one hundred and fifty-three thousand dollars ($153,000.00).

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

_____,
Superintendent of Construction.

_____, [Seal]

(1297)
Witnesses:

_____,

_____,

(Executed in triplicate.)

The Title Guaranty & Surety Co. of Scranton, Pa., the surety on the bond attached to the contract of October 23, 1906, between Bernard R. Green, Superintendent of Construction, and Frank F. Graham, for furnishing and delivering cut granite for the south pavilion of the building for the National Museum, which bond is dated the twenty-sixth day of October, 1906, does hereby consent to the change in said contract above named, and does hereby agree that said change shall not affect its liability on said bond in any manner whatever.

In witness whereof, the said The Title Guaranty & Surety Co. of Scranton, Pa., has placed its hand and caused its seal to be attached hereto this day of March, nineteen hundred and eight.

Approved , 1908, for the Regents of the Smithsonian Institution.

By _____, Secretary."

and that said contract was never executed; and that the changes mentioned therein were never assented to by The Title Guaranty & Surety Company; and the verdict of the jury, under the pleadings in this case, must, therefore, be for the said The Title Guaranty & Surety Company.

Refused.

DEFENDANTS' PRAYER NO. 19.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the United States to recover against The Title Guaranty & Surety Company; and the verdict of the jury must, therefore, be for said defendant.

Refused.

DEFENDANTS' PRAYER NO. 20.

(1298) No evidence has been offered legally sufficient to prove that the Superintendent of Construction annulled the contract, offered in evidence, with the sanction of the Regents of the Smithsonian Institution; and the verdict of the jury must, therefore, under the pleadings in this case, be for The Title Guaranty & Surety Company.

Refused.

DEFENDANTS' PRAYER NO. 21.

That according to the undisputed evidence in this case, the work under the contract of October 23, 1906, offered in evidence, was so materially altered, without the assent of the surety, as to relieve the said surety on the bond from liability; and the verdict of the jury, must, therefore, be for The Title Guaranty & Surety Company.

Refused.

DEFENDANTS' PRAYER NO. 22.

That if the jury find from the evidence that the acts of the United States and the Thompson-Starrett Company prevented the defendant Graham from freighting, cutting, boxing and delivering complete to the United States all of the Bethel granite required for part "C" of the pavilion, mentioned in the contract and specifications offered in evidence, before October 1, 1907; and that the United States without taking any further action in the premises under said contract, and after knowing the work under said contract was not completed before October 1, 1907, and without notice to The Title Guaranty & Surety Company, through its Superintendent of Construction, permitted said Graham to proceed on said work till March, (1299) 1908, and that the United States accepted said work from October 1, 1907, to March, 1908; then their verdict must be for The Title Guaranty & Surety Company.

Refused.

DEFENDANTS' PRAYER NO. 23.

That if the jury find from the evidence that there was unnecessary and unreasonable delay on the part of the United States or the Thompson-Starrett Company in delivering granite stock to the defendant Graham free on board the cars at the quarry at or near Bethel, Vermont, and that said delay alone rendered it impossible for the said Graham to complete his contract by October 1, 1907; and that The Title Guaranty & Surety Company was not notified by the United States of such

delay at any time before October 1, 1907; then, the verdict of the jury must be for The Title Guaranty & Surety Company.

Refused.

DEFENDANTS' PRAYER NO. 24.

That if the jury find from the evidence that a substantial portion of the necessary granite stock was not furnished to the defendant Graham in net dimension blocks free on board cars at the quarry at or near Bethel, Vermont, and that the said Graham was without fault in the premises; then, the verdict of the jury must be for the defendants.

Refused.

DEFENDANTS' PRAYER NO. 25.

No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case; and the verdict of the jury must, therefore, be for the defendants.

Refused.

DEFENDANTS' PRAYER NO. 26.

(1300) No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case against The Title Guaranty & Surety Company; and the verdict of the jury must, therefore, be for the said defendant.

Refused.

And the Court granted the plaintiff's second, third, fourth, fifth, eighth, ninth, tenth, thirteenth and nineteenth (as amended by the Court) prayers; and the Court refused to grant all of the defendants' prayers, and each and every one of them.

To which action of the Court in granting and allowing the plaintiff's second, third, fourth, fifth, eighth, ninth, tenth, thirteenth and nineteenth (as amended by the Court) prayers, and each of them, and in rejecting and refusing all of the defendants' prayers, and each and every one of said defendants' prayers, the defendants, and each of them, then and there excepted, and prayed the court to sign and seal this, their thirty-sixth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Thirty-seventh Bill of Exceptions.

(1301) After the matters and things set forth in the defendants' aforegoing bills of exceptions, all of which are hereby

incorporated in and made a part of this, their thirty-seventh bill of exceptions, at the trial of this case, the Court subsequently delivered an independent charge at large to the jury, reading as follows:

Instructions to the Jury.

The COURT: I will proceed first to dispose of the last proposition discussed by counsel, that is, whether the annulment of this contract was made in bad faith. The differences between the Superintendent of Construction, Mr. Green, and Mr. Graham, the contractor, with regard to the stone furnished to Graham, I am going to leave to you, under instructions which I shall give you but the proof is that, in point of fact, Graham did stop work, discharged his men and told them to look for other employment, and he did not intend to go on with this work until he got some terms from the Government, the terms of which we do not know.

The work was stopped, and thereupon the Superintendent of Construction, Mr. Green, under the terms of the contract annulled the contract and finished the work and charged the cost of its completion to Mr. Graham. It is said that was not done with the sanction of the Regents of the Smithsonian Institution. The proof is that the Regents are a body of men who are constantly occupied, including the Chief Justice of the United States Supreme Court, the Vice-President of the United States and United States Senators, and these men do not meet over three times a year, when they probably discuss and determine the general policies of the Institution. It was said, and there was no proof, to the contrary, that the practise is to leave (1302) all matters of detail, and matters such as this, to the Secretary of the Institution. For a long time they have allowed him to exercise those powers. Could it be said now that he has not the right to exercise those powers and that the parties who deal with him in this way are not dealing with the proper person? The Secretary, acting for the Regents gave his consent to the annullment in the proper manner. Mr. Green stated that in his judgment the contract should be annulled because of the failure of the defendant and therefore the annullment was made. I can see no ground for saying to the jury that the contract was not annulled. I grant those prayers which say that there is no evidence to support the plea that the annullment was without the sanction of the Regents of the Smithsonian Institute. There is no evidence, in my judgment, to show that the annullment was the result of any bad faith on the part of Mr. Green. Mr. Green has acted within his rights, and as the agent of the Government it was his duty to protect the interests of the Government. I do not think that he has gone beyond the limits of his power.

The contract on which this suit is based is in substance between the United States on the one side, and Mr. Graham as a contractor and the Surety Company as his surety for the performance of the contract on the other.

Now, it is not a case for sentimental considerations of any kind. Graham has a right to ask from the Government compliance with its obligations and the Government has the right to require from Graham rightful compliance with his contract, whether profitable to him or not, and to require that the surety shall answer under its bond for his defaults.

The same principles of right and justice which prevail between individuals should control the construction and carrying out of contracts between the Government and those who contract with it, or its agents.

(1303) A much discussed item of the contract is the true meaning of the phrase net dimension blocks. Article Five of the Specifications provides:

"The necessary Bethel granite stock in net dimension blocks is to be furnished to the Government by the present contractor, free on board cars at the quarry in Bethel, ready for the contractor for the cutting of the granite, to transport it to his cutting yards for that purpose. Bidders for the Bethel granite work will therefore bid on the basis and understanding that the granite in net dimension blocks,—one block for each separate pattern,—will be furnished them without unnecessary delay and without charge, free on board cars at the quarry at Bethel, Vermont."

What was understood by the parties to this contract to be meant by net dimension blocks is for you to determine from the weight of all the evidence which you have heard. Most of the witnesses state that they have never met with that term in any contract. That the two kinds of granite stock with which they are familiar are random blocks and dimension blocks. That dimension blocks are those furnished by the quarry in sizes and dimensions from which the stone cutter can produce the desired stone of the dimension required by the setting plan. There obviously must be some excess of sizes in order that the stone cutter can dress down the stone to the exact size and shape required and produce the surface on the stone called for.

Some witnesses have said the dimension stone furnished by the quarry should be only from $\frac{1}{4}$ to $\frac{1}{2}$ inch larger than the finished dressed stone, others say it may be 3, 4, 5 or even 6 inches or more, the only requirement being that it shall be such a piece of stone approximately of the size and shape of the stone to be finished, from which the stone for the building may be cut.

(1304) You must try to determine what was the meaning in this contract and if you can, you should reconcile this wide difference between the witnesses.

It is generally important to find out with regard to such a contract what interpretation the parties themselves put upon it when working under it. How they, by their acts, show that they understood it.

Mr. Graham has said, I think you will recall, that it was not expected that the blocks described as net dimension should be either sawed or cut before he received them, but might run 2 or 3 inches in excess of the dressed stone and that the rough stone should not average more than 225 pounds to the cubic foot of dressed measurement, and should be often something less.

Now, it is for you to say whether on a fair average the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulation was understood by the parties to the contract.

If you find that the stone furnished from the quarry was on a fair average, such as the contract as so understood called for, then Graham could not rightfully, on account of the sizes of the stone, abandon his contract.

On February 10, 1908, Mr. Graham wrote to Mr. Green that he intended to devote his yard to the contract, the payments to be made to him as previously, which tends to show that up to that time although there had been complaints of the roughness of the stone, it may have been on the whole average such as would gratify the contract. But, if you find that in the latter part of February and the early part of March the stone in point of its dimensions and roughness did not comply with the contract, then if you so find, Graham could not be held to the further performance of his contract, and your verdict should
(1305) be for the defendants.

The specifications stipulated that the Bethel granite stock will be furnished to the Government by the present quarry contractor free on board cars at the quarry in Bethel, ready for the contractor who is to cut the granite to transport it to his cutting yards for that purpose.

Does this mean that the Government was responsible for providing the cars? It does not.

If the stone was ready for delivery on board the cars in advance of the cars being furnished to receive it and if the Government, by its agents, made all reasonable efforts to see that cars were furnished, then the defendant Graham was not justified in abandoning his contract, even though the cars came irregularly and not promptly.

The Government, by its contract, did not bind itself to furnish transportation for the stone, it was to be delivered to Graham at Bethel at the quarry and was after that at his risk and cost of transportation until delivered by him at the Government grounds at Washington.

If the jury find from all the testimony that the work done by the Government after the annullment of the contract was done at fair prices and with faithful attention to economy, you are not to consider the fact that the additional cost of the work done by the Government after the annullment was greater than the contract price, except as it may show whether or not the Government proceeded with fidility and care to do the work in an economical manner and did it at a fair cost.

If the expenditure was reasonable and the fair amount for which the Government could reasonably complete the contract, then it makes no matter that it cost more than the contract price, for that possibly may be the very reason why Graham failed to complete it.

(1306) The said charge of the court at large to the jury stated several matters of law or alleged matters of law, set forth in the following eighteen paragraphs, to-wit:

First Paragraph.

"There obviously must be some excess of sizes, in order that the stone cutter can dress down the stone to the exact size and shape required to produce the surface on the stone called for."

Second Paragraph.

"That dimension blocks are those furnished by the quarry in sizes and dimensions from which the stone cutter can produce the desired stone of the dimension required by the setting plan."

Third Paragraph.

"What was understood by the parties to this contract to be meant by net dimension blocks is for you to determine from the weight of all the evidence which you have heard."

Fourth Paragraph.

"You must try to determine what was the meaning in this contract and if you can, you should reconcile this wide difference between the witnesses."

Fifth Paragraph.

(1307)

"Mr. Graham has said, I think you will recall, that it was not expected that the blocks described as net dimension should

be either sawed or cut before he received them, but might run 2 or 3 inches in excess of the dressed stone and that the rough stone should not average more than 225 pounds to the cubic foot of dressed measurement and should be often something less."

Sixth Paragraph.

"Now, it is for you to say whether on a fair average the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulation was understood by the parties to the contract."

Seventh Paragraph.

"If you find that the stone furnished from the quarry was on a fair average, such as the contracts as so understood called for, then Graham could not rightfully, on account of the sizes of the stone, abandon his contract."

Eighth Paragraph.

"On February 10, 1908, Mr. Graham wrote to Mr. Green that he intended to devote his yard to the contract, the payments to be made to him as previously which tends to show that up to that time although there had been complaints of the roughness of the stone, it may have been on the whole average such as would gratify the contract."

Ninth Paragraph.

"It is generally important to find out with regard to such (1308) a contract what interpretation the parties themselves put upon it when working under it. How they by their acts show that they understood it."

Tenth Paragraph.

"And the Government has the right to require from Graham rightful compliance with his contract whether profitable to him or not and to require that the surety shall answer under its bond for his defaults."

Eleventh Paragraph.

"For that possibly may be the very reason why Graham failed to complete it."

Twelfth Paragraph.

"But the proof is that, in point of fact, Graham did stop work, discharged his men and told them to look for other employment, and he did not intend to go on with this work until he got some terms from the Government, the terms of which we do not know."

Thirteenth Paragraph.

"It was said and there was no proof to the contrary, that the practice is to leave all matters of detail and matters such as this to the Secretary of the Institution. For a long time, they have allowed him to exercise those powers."

Fourteenth Paragraph.

"Mr. Green stated that in his judgment the contract should be annulled because of the failure of the defendant, and therefore the annulment was made. I can see no ground for saying to the jury that the contract was not annulled."
(1309)

Fifteenth Paragraph.

"The Secretary, acting for the Regents, gave his consent to the annulment in the proper manner."

Sixteenth Paragraph.

"There is no evidence in my judgment to show that the annulment was the result of any bad faith on the part of Mr. Green. Mr. Green has acted within his rights, and as the agent of the Government, it was his duty to protect the interests of the Government. I do not think that he has gone beyond the limits of his power."

Seventeenth Paragraph.

"If the stone was ready for delivery on board the cars in advance of the cars being furnished to receive it and if the Government, by its agents, made all reasonable efforts to see that cars were furnished, then the defendant Graham was not justified in abandoning his contract, even though the cars came irregularly and not promptly."

Eighteenth Paragraph.

"The Government, by its contract, did not bind itself to furnish transportation for the stone, it was to be delivered to Graham at Bethel at the quarry and was after that at his risk and cost of transportation until delivered by him at the government grounds at Washington."

And the defendants and each of them then and there excepted and stated distinctly the several matters of law or alleged matters of law set forth in the said eighteen paragraphs in said charge to which they and each of them then and there excepted, and prayed the court to sign and seal this, their thirty-seventh bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Thirty-eighth Bill of Exceptions.

(1310) After the matters and things set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their thirty-eighth bill of exceptions, at the trial of this case, the court, in its subsequent instructions to the jury during the argument of counsel for the defendants (Mr. Harley), who was interrupted for that purpose, stated several matters of law or alleged matters of law, set forth in the following six paragraphs, to-wit:

First Paragraph.

"I have said more than once it was not the duty of the Government to furnish the cars. I have said that I thought it was the duty of the Government to co-operate with the parties who were shipping the stone in a reasonable manner, in order to facilitate the shipment. The furnishing of the cars was at the risk of Graham. I do not see that that letter throws any light on the furnishing of the cars." (Referring to the letter of February 8, 1908, from Bernard R. Green, Superintendent of Construction, to Thompson-Starrett Company.)

Second Paragraph.

"In a contract of that kind, I think there was an obligation on both parties to furnish cars—that reasonable efforts should be made to accommodate each other."

Third Paragraph.

"I say to you and to the jury that there is no evidence of delay, because the cars were not furnished. It was not the duty of the Government to furnish the cars."

Fourth Paragraph.

"I have said that the question of delay should be ruled out of the case. Graham never raised the question of delay.

They never charged him with default because it was not delivered up to the time."

(1311) *Fifth Paragraph.*

"I do not think there is evidence upon which the jury would be allowed to say that Graham was justified in abandoning the contract on account of delay in the delivery of the stone. I do not think that can be shown. You may argue upon the fact of the difficulties of proceeding with the contract, because of the excessive weight of the stone and the way in which it was delivered at the quarry. That may be dwelt upon; but as a distinct issue, that the jury may find against the Government, because the stone was not delivered in time, I have said there was no sufficient evidence."

Sixth Paragraph.

"I ought not to let the jury find against the Government now, because of delay in furnishing the stone, because there never was an issue distinctly raised. Graham said 'I am going on now. I am going to devote my whole yard to the performance of the contract.' That letter which Graham writes urging upon the quarryman to furnish the stone, I do not understand that that means they made no efforts."

And the defendants and each of them then and there excepted and stated distinctly the several matters of law or alleged matters of law set forth in the said six paragraphs of said instructions to which they and each of them then and there excepted, and prayed the court to sign and seal this, their thirty-eighth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

Thirty-ninth Bill of Exceptions.

(1312) After the matters and things set forth in the defendants' aforegoing bills of exceptions, all of which are hereby incorporated in and made a part of this, their thirty-ninth bill of exceptions, at the trial of this case, the court permitted the United States' Attorney for the District of Maryland (Mr. Hill), during his closing argument before the jury, to read, over and against the objections of the defendants, from the letter head of a certain letter which had theretofore been of-

fered in evidence, as will more fully appear from the assignments of errors Nos. 14, 15 and 16, the words following:

"Fidelity Judicial. We issue surety bonds. Contract Official. The Title Guaranty & Surety Company. Home Office Scranton, Penna. Capital and surplus over $1,000,000.-00", and to say immediately there after, "There is no room for sympathy for the poor defendant in this case."

And the defendants and each of them then and there excepted to the court's action in permitting the said United States' Attorney for the District of Maryland to read said letter head and use said language "There is no room for sympathy for the poor defendant in this case", and prayed the court to sign and seal this, their thirty-ninth bill of exceptions, which is accordingly done this 2nd day of November, 1910.

THOS. J. MORRIS, [Seal]

The foregoing constitutes a complete record of this case containing in itself everything necessary to the hearing on appeal; but it is hereby agreed that any and all original books, letters, vouchers, warrants, invoices, pay-rolls, exhibits, plans, plats, drawings and any other papers referred to in the record (1313) and in evidence in this case, or copies certified to by counsel for the three parties, if desired by counsel for any party hereto, may be used to all intents and purposes at any hearing of this cause in any court as fully and effectually as though the same had been set forth at large in the aforegoing bills of exceptions or any part of said record.

JOHN PHILIP HILL,
J. CRAIG McLANAHAN,
Counsel for the plaintiff,
the United States of America.
GEORGE R. GAITHER,
Counsel for the defendant, Frank F. Graham.
CHARLES F. HARLEY,
Counsel for the defendant,
The Title Guaranty & Surety Company.
BURDETTE B. WEBSTER,
Trustee for Frank F. Graham, bankrupt.
JOHN B. A. WHELTLE,
Counsel for Burdette B. Webster,
Trustee for Frank F. Graham, bankrupt.

PETITION FOR WRIT OF ERROR, ASSIGNMENT OF ERRORS AND ORDER OF COURT THEREON ALLOWING SAME.

(1314) Filed August 24, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff,
vs.
Frank F. Graham and The Title Guaranty & Surety Company, a body corporate, Defendants.

To the Honorable the Judges of said court:

Frank F. Graham and The Title Guaranty & Surety Company, the defendants in the above entitled case, and each of them, pray that a writ of error may be allowed to them and to each of them, and they further pray that a duly authenicated transcript of the records, proceedings and papers upon which the judgment herein was rendered may be sent to the United States Circuit Court of Appeals for the Fourth Circuit; and they herewith file their assignment of errors.

GEORGE R. GAITHER,
Attorney for Frank F. Graham.
CHARLES F. HARLEY,
Attorney for The Title Guaranty & Surety Company.

Ordered by the Circuit Court of the United States for the District of Maryland this 24th day of August, 1910, that the prayers of the foregoing petitioners be, and they are hereby granted, and the writ of error is allowed to said defendants and each of them, as prayed; and the amount of the writ of error bond is fixed at sixty thousand dollars, for said defendants jointly, or for either of said defendants separately, which bond when approved and filed shall operate as a supersedeas.

THOS. J. MORRIS, Judge.

ASSIGNMENT OF ERRORS.

(1315)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff,
vs.
Frank F. Graham and The Title Guaranty & Surety Company, a body corporate, Defendants.

To the Honorable the Judges of said court:

Now come Frank F. Graham and The Title Guaranty & Surety Company, the defendants in this case, and each of them, and file the following assignment of errors, upon which they and each of them will rely in the prosecution of the writ of error in the above entitled case:

1. That the court erred in sustaining the plaintiff's demurrer to the third plea of Frank F. Graham to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

2. That the court erred in sustaining the plaintiff's demurrer to the third plea of The Title Guaranty & Surety Company to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

3. That the court erred in sustaining the plaintiff's demurrer to the fourth plea of Frank F. Graham to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

4. That the court erred in sustaining the plaintiff's demurrer to the fourth plea of The Title Guaranty & Surety Company to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

5. That the court erred in sustaining the plaintiff's demurrer to the fourteenth plea of Frank F. Graham to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

6. That the court erred in sustaining the plaintiff's demurrer to the fourteenth plea of The Title Guaranty & Sure-
(1316) ty Company to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

7. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's counsel propounded to witness Richard Rathbun:

"Now, will you just state how this approval was made and what the approval of the Smithsonian Institution means?"

Answer: The approval was made by the Secretary of the Smithsonian Institution, or by the Acting Secretary, who, by law, is given the same authority in his absence. The answer to the latter part of the question is simply this, that the Secretary of the Smithsonian Institution is actually or virtually the director of the Smithsonian Institution—I am not giving this as a matter of opinion, I would like to say, but as something which is contained in the documents of the Government. It is printed in statutes among the Acts of Congress, and I am not giving it as my opinion at all, but a reference to the documents will show the Secretary of the Institution—

8. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's counsel propounded to witness Richard Rathbun:

"You are referring to the documents of the Smithsonian Institution aren't you?

Answer: "The Secretary is given entire authority to plan and conduct the operations of the Smithsonian Institution by resolution of the Board of Regents, which is repeated every year. It is only subsequently that the accounts are examined by the Board of Regents or the Executive Committee."

9. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Charles D. Walcott:

"Under what authority did you sign this letter of March 18, 1908, in which you approved the annulment of the contract?

Answer: "Under the authority—I don't recall the Acts by which the authority is granted—but it has been the gen-

eral custom and practice—for the Secretary to approve of all contracts, agreements and matters relating thereto in connection not only with the construction of the present National Museum building, but also of other similar matters which (1317) may have come *up* from time to time."

10 That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Charles D. Walcott:

"How old is this custom, if you know?"

Answer: "My personal recollection is that it dates back to 1856.

11. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Bernard R. Green:

"Mr. Green, in the Articles of Agreement it is stated that you made the agreement as Superintendent of Construction acting under the direction of the Regents of the Smithsonian Institution. Why was that put in there, and did you act under that direction?

Answer: "It was put in there for propriety. I was in charge of the construction of the Museum under the law, but as the building was being erected for the purpose of the new National Museum, under the management, practically, of the Regents of the Smithsonian Institution—as the Museum has always been under their management and still is and was at the time—as a matter of courtesy, as the law itself did not specify particularly what my relations to the Institution would be, I naturally supplied the deficiency by assuming that the building should be constructed as the Regents of the Smithsonian Institution, who were in charge of the Museum, desired it to be. It was not my desire to go on and contract the National Museum without consulting the wishes of the Regents, as the law did not specify the details, and I wanted to build the building in conformance with their wishes as far as I could do it. I had no reason to feel and have none since that I should go in any way contrary to the wishes and desires of the Regents of the Smithsonian Institution in this matter. That was why that was put into the contracts and their approval obtained to all the contracts which really covered most of the proceedings towards the construction of the building."

12. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Bernard R. Green:

"Mr. Green, before writing these two last read letters" (1318) (being letters from said witness dated March 18, 1908, to the defendants and purporting to annul the contract of October 23, 1906) "did you consult with the authorities of the Smithsonian Institution?"

Answer: "I do not remember specifically. I am quite sure I did, because I was in consultation and discussion with the Secretary who represented the authorities, about the whole matter while it was in progress."

13. That the court erred in refusing to grant the defendants' motion to strike out as voluntary and irresponsive that portion of said answer appearing in the twelfth assignment of error immediately after the word "Secretary", and reading as follows: "Who represented the authorities, about the whole matter while it was in progress."

14. That the court erred in admitting evidence on behalf of the plaintiff as follows, that is to say, permitting the witness Bernard R. Green, to read to the jury the printed letter head of a letter dated April 11, 1908, from Philip Walker to Bernard R. Green, the said letter head being no part of the body of said letter: "Fidelity—Judicial. We issue surety bonds. Contract—Official. The Title Guaranty & Surety Company. Home Office: Scranton, Pa. Capital & Surplus over $1,000,000.00." (said figures being printed in red ink). Philip Walker, Attorney. George T. Parker Company, General Agent. 201-227 Colorado Building. 'Phone Main 3491. Worthington, Heald & Frailey, Local Counsel, Washington, D. C."

15. That the court erred in admitting evidence on behalf of the plaintiff as follows, that is to say, permitting the witness Bernard R. Green to read to the jury the printed letter head of a certain letter dated April 15, 1908, under the following circumstances:

Question propounded to witness Bernard R. Green:

"Here is a letter dated April 15th, 1908, signed Philip Walker, addressed to you. If you received this letter, read the whole of it including the printed heading at the top of the letter both in black and red ink, as you did the prior letter.

Answer: "As I said, I received this letter from Philip Walker, dated April 15, 1908. The sheet contains this: "Fi- (1319) delity Judicial. We issue surety bonds. Contract Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and Surplus over $1,000,000.- 00, (said figures being printed in red ink) Philip Walker Attorney. George T. Parker Company, Genl. Agt. 291-227 Colorado Building. 'Phone Main 3491. Worthington, Heald & Frailey, Local Counsel."

16. That the court erred in admitting evidence on behalf of the plaintiff as follows, that is to say, a letter dated April 15, 1908, from Philip Walker to Bernard R. Green:

"Washington, D. C., April 15, 1908.

Bernard R. Green, Esq.,
Superintendent of Construction,
Library of Congress, City.

Dear sir:

I have a letter from our attorney in Baltimore today, from which I quote the following for your information:

'In response to your favor of the 11th instant enclosing letter from Superintendent of Construction Bernard R. Green under date of April the tenth and copy of your response thereto of April 11th, I beg leave to advise you that I have had a conference with Mr. Scherf this morning.

"I fail to see why Mr. Green should have to ask anybody for his property. The stone belongs to the Government; and Mr. Scherf has advised me that Mr. Graham will not contest the right of the Government to take its own property.

'However, as to the use of Mr. Graham's machinery, I have not been able to make any arrangements with Mr. Scherf. I had hoped to make an engagement by which you could see Graham himself today. Indeed, Mr. Scherf promised to arrange this, but later notified me that it would not do any good.

'The question now seems to be what arrangement can you make with Graham for the use of his machinery for the purpose of moving the stone.'

'If no arrangement can be made, Superintendent Green will simply have to move this Government property without the aid of Graham's appliances.'

Yours very truly,

PHILIP WALKER."

(1320) 17. That the court erred in admitting evidence on behalf of the plaintiff as follows, that is to say, permitting the witness Bernard R. Green to read to the jury the printed re-letter head of a certain letter dated November 23, 1906, under the following circumstances:

Question propounded to witness Bernard R. Green:

"Mr. Green, I here show you a letter of November 23rd, 1906, addressed to you and signed George T. Parker, General Agent, and referring to an inclosure. Please look at this letter and if you received it, read to the jury, reading the same time the heading as before.

Answer: "I received from Mr. George T. Parker, General Agent, this letter dated 23rd of November, 1906. The sheet contains this: "Fidelity Judicial. We issue Surety Bonds. Contract Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and Surplus over $1,000,000.00. (said figures being printed in red ink) Worthington, Heald & Frailey, Local Counsel. George T. Parker, General Agent, 201-227 Colorado Building. 'Phone: Main 3491. Philip Walker, Attorney."

"Washington, D. C., 23 November(1906.

Bernard R. Green, Esq.,
Superintendent, Library of Congress,
Washington, D. C.

Dear sir:

Herewith I have the honor to hand you for file certified copy of Power of Attorney authorizing Geo. T. Parker, Philip Walker, Willis W. Parker and William R. Parker, or any two of them, to execute bonds for this company.

Kindly acknowledge receipt of the same, and oblige,

Yours respectfully,

GEORGE T. PARKER,
General Agent."

Inclosure, J. M.

18. That the court erred in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you ever communicate to the Regents of the Smithsonian Institution the changes made by you in setting plan (1321) No. 20?"

19. That the court erred in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"I want to ask you whether you have communicated to the Regents of the Smithsonian Institution the long delays that were occasioned by you and your office in approving the setting plans submitted by Mr. Graham?"

20. That the court erred in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution the fact that you had made numerous and material changes in the plans for this building?"

21. That the court erred in refusing to allow counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution the fact that you were responsible for delay in approving these plans?"

22. That the court erred in refusing to allow counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution at any time the fact that the Government had not delivered to Mr. Graham with promptness the granite F. O. B. in net dimensions at the quarry in Bethel, Vermont?"

23. That the court erred in refusing to allow counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"You have nothing here to show, then, how many cubic feet of stone you cut on the Graham job?"

24. That the court erred in saying to counsel for defendants in the presence of the jury immediately after the pro-

pounding of the question mentioned in the twenty-third assignment of error:

"You can not expect a man in charge of a big job like this (1322) to carry all those figures in his mind."

25. That the court erred in using in the presence of the jury the following language:

"The contract says that the payments shall be made from time to time as the progress of the work may warrant. Surely the man who is to make the payments is the man to judge how much is warranted."

26. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Bernard R. Green on re-direct examination:

"On page 424 of the record, your cross-examination, and on page 425, questions were asked you in reference to your absence from Washington; could or could not the work under the Graham contract be continued during your absence from Washington by your office force in Washington?

Answer: "It could be continued, and it was continued perfectly well."

27. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Bernard R. Green on re-direct examination:

"Doesn't a comparison of the blue print marked "Superceded" and bearing upon it the endorsement "Approved October 21, 1907," and the tracing marked "Approved January 29, 1908", show that in the preparation of the first setting plan an error had been made by Mr. Graham or his draftsman in the quantity of stone shown upon the courses?"

Answer: "It shows that this is a new tracing. The original tracing evidently from which this blue print was made, bears my approval marked "October 21, 1907". The similar

approval marked and placed upon the new tracing in a similar spot shows that there was no previous signature or approval marked on that. That is perfect evidence to my mind that this is a new tracing made from the original one and that the stones are corrected upon it."

28. That the court erred in using in the presence of the jury the following language:

"This is as slow as cutting granite."

(1323) 29. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Albert L. Harris:

"What is the usual form for furnishing setting plans that you have come across in your experience of twenty-one years in architecture?

Answer: "The usual form is the form as stated in Mr. Green's letter."

30. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness William Pirie:

"Now, will you state whether or not the material shown in all these vouchers was received at the building, if you know, personally?"

Answer: "I will state to the jury that I spent Saturday reading them over and there was no voucher for material that we did not receive."

31. That the court erred in addressing to counsel for the defendants in the presence of the jury the following language:

"I can not see why you emphasize that of being of such supreme importance."

32. That the court erred in addressing to counsel for the defendants in the presence of the jury the following language:

"I think you are rather violent with the witness, and I can not see that it is of such supreme importance."

33. That the court erred in admitting in evidence on behalf of the plaintiff in the testimony of the witness Frederick R. Freas, the "gate rolls".

34. That the court erred in admitting in evidence on behalf of the plaintiff in the testimony of the witness Frederick R. Freas, the "time books, just the small Library books."

35. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Frederick R. Freas:

"Now, of all those vouchers which you looked over, can (1324) you state whether or not there was anything included in those vouchers, any item which was not received on the contract No. 25?

Answer: "I believe there are no vouchers in there—when I saw them the other evening there was some made out at the Library Office, but we received the goods."

36. That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Vernon H. Hagan:

"Can you state whether or not the time and the names of the men as shown on those pay rolls are correct, as compared with the gate roll and time books?"

Answer: "They are correct."

37. That the court erred in refusing to admit evidence on behalf of the defendants as follows:

The original contract dated October 17, 1904, and the specifications annexed thereto as a part thereof, between Bernard R. Green, Superintendent of Construction, and the Thompson-Starrett Company, the full substance of said rejected evidence being as follows:

BUILDING FOR THE NATIONAL MUSEUM.

(1325) Washington, D. C., Sept. 1, 1904.

SPECIFICATIONS

FOR

CUT GRANITE FOR EXTERIOR AND COURT WALLS EXCLUSIVE OF SOUTH PAVILION.

Description and Conditions.

1. The cut granite called for in the foregoing advertisement and described in these specifications, comprises all the stones necessary to the construction of the facades of all the exterior walls of the building (exclusive of the South Pavilion) and all the stones required for the walls of the two courts, as further described below and as represented in the twenty-five (25) sheets of drawings Nos. 14 to 38, both inclusive, prepared by

HORNBLOWER AND MARSHALL,
Architects, Washington, D. C.

2. The several drawings are as follows:

No. 14, Block Plan.
Nos. 15, 16, 17, Basement Plan.
Nos. 18, 19, 20, First Floor Plan.
Nos. 21, 22, 23, Second Floor Plan.
Nos. 24, 25, 26, Third Floor Plan.
Nos. 27, 28, 29, 30, Exterior Elevations, East and West Court Elevations.
Nos. 31, 32, Court Elevations
Nos. 33, 34, 35, 36, 37, 38, one-half inch scale details.

3. The exterior wall fronts are to be wholly of granite.

4. The court walls will be mainly of brick trimmed with the granite herein called for and as shown in the drawings.
(1326)

5. Figures on the drawings are to be taken wherever they occur in preference to scale dimensions.

All explanations and notes on the drawings are to be considered a part of the drawings and used as such.

6. Any discrepancies or obscurities discovered in the drawings or specifications, or both, must be immediately brought to the notice of the Superintendent of Construction for explanation before proceeding with any work affected by them.

7. The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at not less than one-quarter inch to the foot scale ($\frac{1}{4}$″-1′), prepared as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of work on the cutting of the stones they represent, to give ample time for examination and approval. The setting plans for the lower courses of the basement story (the first courses to be cut) must be prepared and submitted immediately after execution of the contract.

8. In laying out these drawings the courses of stone are to be lettered, as shown in the original drawings, in two series of letters, namely: Beginning at the first course above the water table, A, B, C, upward to the end of the alphabet, the remaining courses at the top of the wall to be Az, Bz.

Beginning at the water table, the basement story will be double-lettered downward, AA, BB, CC, to the bottom course HH.

In the courts a separate series of letters will be used from the ground to the cornice. The several stones of each course will be numbered serially from the east side of the south pavilion entirely around the building to the west side of same for the front walls, and a similar but separate number series will be used around the east court and continued into and around the west court. Thus no two stones in the building will have the same mark.

9. Blue or white prints of these drawings, mounted on muslin, not exceeding twelve of each sheet, shall be furnished at his own cost by the contractor to the Superintendent of Construction promptly as may be called for from time to time for the use of his office and operations on the building.

10. Each and every cut stone shall be marked by the contractor before shipment from the cutting yards, plainly with indelible black paint, both on an end joint of the stone and the outside of the boxing, with its proper course letter and number.

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11. As soon as each stone is finished and accepted by the Government inspector at the cutting yards, it must be carefully and substantially boxed with stout lumber that will not stain the stone and strapped and secured with galvanized iron (1327) and galvanized nails. This boxing shall be at least as good as the inspector may approve of, but the contractor will remain responsible for the safe delivery of the stone on the site of the Museum building.

12. The preparation and delivery of the stone must proceed as nearly as may be directed by the Superintendent of Construction in the natural order of building.

13. The drays delivering stone at the site of the building shall haul the loads to points designated by the Master Mechanic. They will there be unloaded and the stones piled by the United States.

14. The contractor shall provide all necessary patterns, gauges, templates, squares, edges, tools, implements, machinery, buildings, materials, labor, etc., and transportation for the most prompt, expeditious and complete performance of all work involved in furnishing, preparing and delivering at the site of the building all of the cut and rough granite called for in his contract.

15. Full size profiles will be supplied to the contractor by which he shall accurately make the necessary templates and patterns.

16. The Act of Congress, approved March 3, 1903, authorizing the construction of the building provides that "a contract or contracts for its completion is hereby authorized to be entered into subject to appropriations to be made by Congress." The contracts for the cut granite entered into under these specifications and the continuity of the work will therefore be subject to the appropriations that Congress may make from year to year, as is done with many other Government contracts.

17. The quantity of cut granite to be furnished each fiscal year will be regulated as nearly as practicable by the Superintendent of Construction to correspond to the respective annual appropriation in justice to other parts of the work and other contractors, should any such appropriation happen to be inadequate to the full practicable progress of the year's work, otherwise the contractors shall make the progress hereinafter stipulated to be made for prompt completion.

18. The contractor shall if required by the Superintendent of Construction, cause a valid and binding lease or leases of the quarry or quarries from which the stone is to be taken to be executed by the owner or owners of the quarries to the United States, to take effect upon the failure of the contractor to supply all the stone required by his contract to be taken from said quarry or quarries, said lease or leases to authorize the United States to take full possession of the said quarry or quarries and the entire equipments for working the same and to work the same at the expense of the contractor or contractors, in case of default. The validity of the ownership or control of quarries must be established by bidders if called upon for it.

19. Bidders are required to return all drawings with their proposals and, if not to submit proposals, to return them immediately.

Granite.

20. All the granite must be of a permanently bright color, evenly mixed ingredients and compact texture, tough and thor-
(1328) oughly suitable for fine cutting and moulding and sharp arrises.

It must be uniformly free from course specks, blotches, or streaks of any kind or color which may affect to the eye the continuity of cut lines, mouldings or surfaces. Every stone must be sound and free from flaws, seams, shakes, stains, discolored knots or streaks, or impurities that may cause future stain or discoloration.

21. Because of the magnitude of the building, granite from several different quarries may be used to expedite the work of construction, but this will be determined upon as the kinds, shades and textures of the several granites and the respective bids for the same may appear on the opening. It is to be understood, however, that the awards of contracts will be primarily dependent upon the suitability of the different granites and the matching up of the same in the judgment of the Architects and the Superintendent of Construction in order to satisfactorily secure the following result, namely:

22. A course grained granite of somewhat darker color for the Basement Story (courses HH to AA inclusive); a lighter and finer grained granite for the First and Second Stories from the top of the water table to and including the main cornice and pediments (courses A to U inclusive) and for the court walls; and a still lighter and finer grained granite for

the *Attic* (courses V to Bz inclusive, to the top of the walls and dormer windows).

23. In selecting the granites and prices it is possible that three different quarries may be drawn upon for the *Basement* walls divided as follows:

1. From A eastward around to the angle at B.

2. From angle B northward, along the whole north front and the west side of building to C.

3. From angle at C southward and eastward along the south front to angle at D.

(See the block plan No. 14.)

The first and second stories, comprised in courses A to U inclusive and including the main cornice and pediments complete will all be of one granite practically from the same quarry.

The attic or third story, comprised in courses V to Bz inclusive and including the dormers will also all be of one granite and practically from one quarry.

The granite of the court walls will all be from one quarry.

24. The proposals must therefore be in separate amounts for each of the separate sections of the building above described and as set forth in the blank form of proposal herewith. It is understood that any one or more of these proposals may be accepted independently and regardless of the others.

25. Each proposal must be accompanied by a sample block of the granite proposed to be furnished. The sample to be 2 feet x 1 foot x about 4 inches thick, and dressed 6-cut work (1329) on one flat face, jointed at edges and rough on the other face. The name of the bidder must be *cut in* the dressed face.

26. The proposal must state the location and name of the quarry from which the sample is taken and the locations of important buildings built of the stone not less than eight years ago.

27. As the granite for the pavilion and dome at the south front of the building is not included in the proposal and con-

tract herein provided for and as it will have to be procured later to match the granite adopted for the first and second stories, the contractor for the last mentioned granite must agree to furnish to the United States "F. O. B." at the quarry at any time within two years after the expiration of his contract, all the granite needed from said quarry for the construction of the said pavilion and dome after the general design of the said pavilion shown in the drawing or any architectural modification thereof, at a price per cubic foot (quarry dimensions) to be stated in the proposal. The said quarry dimensions of the several rough blocks for the stones to compose the said pavilion and dome shall be the three net cubic dimensions of the dressed stone.

Cutting:

28. All the stock must be essentially full to the lines and dimensions on the drawings. The several stones must also be such as will bond well with the brick backing of the walls.

29. The finished dimensions, gauges, etc., of all stones must be to the United States standard measure.

30. The grades of cutting for the several parts of the walls will be as follows, excepting as otherwise particularly specified, namely:

For the basement story and attic, as above defined, and the court walls, good four-cut work, and for the first and second stories including the main cornice and pediments all as above defined, good six-cut work. The face of the bossage (or raised faces of the ashlar fronts) in the basement, above the window sills and below the water table course, will be in course picked work.

31. The *quality* and *character* of the several grades of cutting and of the picked work above named that will be uniformly required of the contractor is distinctly represented in four large dressed samples of granite prepared by the United States expressly for this purpose and to be seen at the site of the building on the Mall, B street at 10th street, N. W., Washington, D. C. Bidders should carefully inspect these samples before making up their proposals.

32. Machine dressing of the stone shall be re-dressed by hand if deemed necessary by the Superintendent of Construction to produce the desired hand-cut quality of work.

33. All buch hammer cuts must be parallel and squarely across the faces of the stones as will be directed. All cutting of arrises and of all projecting mouldings, fillets, etc., shall be carefully done to avoid "stunning." All bushing and pointing must be done with sharp tools.
(1330)

34. Hidden and rear faces of the work, top angles of mouldings or other projections cut on to stones, and other parts of the work unseen from the fronts of the building or from any of the windows, etc., may be left more or less roughly finished as may be specially directed, but the stock must be full to avoid holes or lumps to collect dust and water.

35. All sills, projecting courses, platforms, copings, etc., will be cut with proper seats and washes for jambs, architraves, etc.

All moulded work will be accurately profiled, cut to dimensions and jointed as shown on the drawings and by such details and models as will be furnished to the contractor by the Superintendent of Construction.

The curved pediments will be cut from the solid and finished to the proper radius.

The entasis of the columns must be carefully cut according to the detail drawings and especially to secure exact fitting and alignment of the several drums.

The inside returns of the window jambs will be finely cut as directed at least 4 inches back from face of removal to allow for window finish.

The inside faces of all high window sills must be dressed off where necessary to clear inside furring or finish, and all thin sills must be fine joint cut at the back.

36. No patching or mending of stones in any way whatever will be allowed excepting in rare and unimportant cases, and then only by special consent of the Superintendent of Construction in each separate case.

37. In making up the estimate bidders will disregard the rough blocks marked "carved" in the attic story including the two pieces on top of each of the pediments but excluding the pieces *within* the pediments, as noted in writing on the drawings. In place of these rough blocks bidders will include in their estimates the substitution of plain dressed ashlar work.

Jointing:

38. All joints, beds and builds must be full and fine joint cut and free from large plug holes, the axe to be freely used,

They must be carefully worked from true and full margin drafts. All dimensions of stones given in the drawings and schedules are the full net dimensions without allowance for thickness of joints. The contractors will therefore allow for joints as follows: For all bed joints one-quarter of an inch ($\frac{1}{4}''$) and for all end or vertical joints three-sixteenths of an inch (3-16″). Particular care must be exercised in the cutting that all the joints shall be exact and uniform. All joints must be fine cut and full within three inches (3″) of the faces of the stones and axed full for at least three-quarters of the bed and one-half of the build and end joints, the fullness properly distributed and no deep or wide plugs holes or cavities.

39. False jointing deeply and carefully cut for pointing with mortar may be done in certain cases where deemed proper (1331) and allowed by the Superintendent of Construction.

40. Every stone must be cut of wind, die square, of full pattern throughout and exactly to the dimensions and shape called for by the drawings.

41. Dove-tail lewis holes of proper depth must be accurately cut in the top bed of every stone and so located that the stone will hang level and plumb.

Carving.

42. No carving is to be included in the contract, but the contractor will, as a rule, furnish all blocks required for the carving as indicated in the drawings or to be directed by the Superintendent of Construction, properly jointed to fit into place and with rough stock enough projecting and full jointed to permit the carving to be properly done by the United States.

Time.

43. The cut granite of the respective sections or parts of the walls above separately designated shall all be furnished and delivered within the following times after the date of notification of the approval of the contract, namely:

1. Courses III and GG of Basement front walls complete within four months.

2. Remainder of basement story front within nine months.

3. Courses A to H of first story front complete within eight months.

4. Remainder of first and second stories front complete within one and a half years.

5 The attic or third story complete within one and a half years.

6. Course A of court walls complete within four months.

7. Courses B and C of court walls complete within nine months.

8. Remainder of court walls complete within one year.

The several courses of stone must be promptly completed and delivered for the natural order of building so that construction may proceed regularly in proper order. Payment for stones delivered much out of proper order, as may be decided by the Superintendent of Construction, will be reserved.

Payments in general will be regulated by the promptness, system and good progress made by the respective contractors in fulfilling the time schedule above laid down.

Read the General Instructions and Conditions, herewith.

ARTICLES OF AGREEMENT.

(1332)

This Agreement, entered into this seventeenth day of October, nineteen hundred and four, between Bernard R. Green, **Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and** Thompson-Starrett Company, (a corporation existing under the laws of the) State of New York, of the second part,

Witnesseth, that, in conformity with the advertisement, specifications, instructions, and general conditions hereunto attached, which form a part of this contract, the said Bernard R. Green, and the said Thompson-Starrett Company, do covenant and agree, to and with each other, as follows:

The party of the second part shall furnish and deliver at the site of the Building for the National Museum on the north side of the Mall opposite Tenth street, Washington, District of Columbia, from the quarries of the E. B. Ellis Granite Company at Bethel, County of Windsor, State of Vermont, and in strict accordance with the sample of granite from said quarries submitted by the said party of the second part with their competitive proposal for this contract, all of the cut granite required for the front walls of the first and second stories, being courses A to U, both inclusive, and including the main

cornice and pediments complete, of the first and second stories of said building, and do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions, all for the gross sum of three hundred and sixty-two thousand four hundred and forty-eight and 63-100 dollars ($362,448.63).

It is further agreed by the parties hereto that the party of the second part shall, within two years from date of the completion of this contract, if required by the party of the first part, furnish for the said building, "free on board" cars at the said quarries, all of the granite of the same kind and quality as hereinbefore specified and in proper dimension blocks, required for the construction of the central pavilion and dome at the south front of the building as shown in the said drawings or any architectural modification thereof, for the price of eighty-two and one-half cents ($0.82½) per cubic foot.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the Superintendent of Construction as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 42 of the attached general conditions. (1333)

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Superintendent of Construction, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Regents of the Smithsonian Institution, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulat-

ed to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract or otherwise, in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, in lieu of annuling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, that the party of the first part may, with the prior sanction of the Regents of the Smithsonian Institution, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

(1334)

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or

modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Regents of the Smithsonian Institution: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Regents of the Smithsonian Institution.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 41 of the general conditions hereto attached and forming part of this agreement.

12. Neither this contract or any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said Thompson-Starrett Company are reserved to the United States. But this stipulation is not to be construed to extend to this contract.

13. No Member of or Delegate to Congress is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

14. This contract shall be subject to approval of the Regents of the Smithsonian Institution.

(1335)

In witness whereof the parties aforesaid have hereunto placed their hands, the date first hereinbefore written.

Witnesses:

JOHN Q. SHEEHY, as to BERNARD R. GREEN,
Superintendent of Construction.

[Seal]

THOMPSON-STARRETT CO.,

[L. S.] By THEODORE STARRETT,

Attest: President.

L. J. MORTON, Treasurer.

(Executed in triplicate.)

Approved February 7, 1905, for the Regents of the Smithsonian Institution.

By S. P. LANGLEY, Secretary.

(1336) 38.—That the Court erred in refusing to admit and in striking out evidence on behalf of the defendants as follows:

Q. Now, will you state whether or not Mr. Bernard R. Green did not in writing extend the time of the completion of the original contract with the Thompson-Starrett Company until June 30, 1907? A. He extended the completion of the cut stone part of the contract, not the rough stone.

Q. Until June 30, 1907? A. That was cut stone under the Thompson-Starrett contract.

The aforegoing having been objected to by the District Attorney and stricken out by the Court on said objection.

(1337) 39.—That the Court erred in refusing to admit evidence on behalf of the defendants as follows:

The lease dated October 31, 1904, between the Thompson-Starrett Company and Bernard R. Green, Superintendent of Construction, of the quarry at or near Bethel, Vermont, the full substance of said rejected evidence being as follows:

(1338) This Indenture, made the 31st day of October, in the year of our Lord one thousand nine hundred and four, between the Thompson-Starrett Company, a corporation organized under the laws of the State of New York, County of New York, party of the first part, and Bernard R. Green, Superintendent of Construction of the building for the National Museum, for and on behalf of the United States of America, party of the second part,

Witnesseth:

That the said party of the first part, for and in consideration of the covenants and agreements contained in certain articles of agreement by and between the parties hereto, bearing date of October 17th, 1904, for furnishing and delivering from the quarries at Bethel, County of Windsor, State of Vermont, of all the granite required for the front walls of the first and second stories of the building for the National Museum in Washington, District of Columbia, to be kept and performed by the party of the first part hereto, hath demised and leased and by these presents doth demise and lease to the party of the second part all those premises, together with the appurtenances thereto belonging, situate in the Town of Bethel, in the County of Windsor, State of Vermont, known and described as follows, to-wit:

A certain tract of land in said Bethel, bounded as follows:

Beginning at a beech tree at the intersection of the boundary line of the premises hereby conveyed and the Chatfield farm on the east, and the southerly line of the premises hereby conveyed and the land of H. W. Davis on the south and running thence north 47° east 249½ rods, along the westerly line of the Chatfield farm and the Benedict farm; thence north 42° west 32 rods to a gate; thence along said gate to the end thereof; thence north along a stone wall 65½° west 44 rods; thence still north along said stone wall 66° west 120 rods to the end of said stone way, which stone wall separates the premises hereby conveyed from premises of Charles Waterman and land formerly owned by F. A. Stevens; thence south 71½° west 128 rods, along another stone wall; thence south 89° west 22 rods and 7 links; thence due north 11 rods 13 links to an apple tree with iron pin at base; thence north 54° west 12

rods to an iron pin and stones; thence north 77° 10′ west 26 rods 23 links to a yellow birch tree with an iron pin in the same; thence south 11° 35′ west 42 rods 6 links to an iron pin; thence north 55° 45′ west 32 rods 21 links to an iron pin and stone; thence south along the easterly line of lands now or formerly owned by E. F. Felton to an iron pin; thence south 36° east 31 rods 7 links to an iron pin; thence south 51½° west 8 rods 10 links to an iron pin; thence south 33½° west 16 rods 19 links to the westerly end of a stone wall separating the premises hereby leased from lands now or formerly owned by H. W. Davis; thence along said stone wall south 56° 45′ east 114½ rods to the point or place of beginning; the above premises being known as the L. H. Abbott farm, the Eight Acre Lot and the Bagley Lot, and being the same premises conveyed to the E. B. Ellis Granite Company by deeds from Edwin B. Ellis and Goldwin Starrett, dated December 21, 1903, recorded in Office of the Clerk of the Town of Bethel December 22, 1903, in Book 28, page 408; also deed same to same, dated December 21, 1903, recorded December 22, 1903, Book 28, 408.

(1339) Also the right of way to pass to and from the premises and the granite ledges thereon for the purpose of working and quarrying said ledges and transferring the products of said premises and said ledges from all parts of said premises and said ledges over the road as now traveled from the opening of the ledges to the road leading from the village of Bethel to said premises.

Meaning hereby to convey the parcels of land described in deeds executed by Edwin B. Ellis and Goldwin Starrett to E. B. Ellis Granite Company on the 21st day of December, 1903, recorded in the Office of the Clerk of the Town of Bethel, Windsor County, Vermont, in Registry of Deeds, Book 28, page 408, and also, during the purposes of the lease, the use of the shafts, sheds, appurtenances and lands required for procuring, preparing and shipping all of the aforesaid granite required for the first and second story front walls of the building for the National Museum.

To have and to hold the above mentioned and described premises, with the appurtenances, unto the said party of the second part, for the period of one and one-half years from and after the 17th day of October, in the year of our Lord one thousand nine hundred and four, and for and during such further time as may be necessary to procure from the said premises delivery of all the aforesaid granite required for and to be delivered at the building for the National Museum, the full right, authority and power to enter upon or occupy and use the same or procure therefrom any and all such granite as the said

party of the first part shall fail, omit or decline to furnish for the said building for the National Museum under the aforesaid articles of agreement between parties hereto.

It is expressly understood and agreed that, if the said party of the first part shall perform all and singular the covenants, stipulations and agreements contained in the aforesaid articles of agreement between the parties hereto, this lease shall be void and of no effect, but that, if the said party of the first part shall be in default in the performance of said articles of agreement then this lease shall be of full effect and virtue.

And it is expressly understood and agreed that the aforesaid entry or occupancy of the said premises shall not be made unless the said party of the first part shall be in default in the aforesaid articles of agreement and unless the party of the second part shall give to the party of the first part eight (8) days' notice in writing of his intention to do so, and in case of said default or failure to comply with the conditions of said articles of agreement at the end of said eight (8) days, the party of the second part shall enter into full and complete possession of said premises with the appurtenances aforesaid, until the purpose of this lease, as herein declared, shall have been accomplished.

And the party of the second part further covenants with the party of the first part, that, at the expiration of the time in this lease mentioned, he will yield up said demised premises to the party of the first part.

In testimony whereof the said parties hereto have hereunto, and to a triplicate hereof, set their hands and seals the day and year first above written, the party of the first part acting herein by Theodore Starrett, its President, hereto duly authorized.

(1340)

THOMPSON-STARRETT CO.,
THEODORE STARRETT, President.
[L. S.]

L. J. MORTON, Treasurer.

BERNARD R. GREEN, [Seal]
Superintendent of Construction of Building for National Museum.

Signed, sealed and delivered in the presence of:

CHARLES M. BEECKER,
as to Theodore Starrett.
JOHN Q. SHEEHY,
as to Bernard R. Green.

STATE OF NEW YORK,
County of New York, } *ss:*

On the third day of November, in the year of our Lord one thousand nine hundred and four, before me personally came Theodore Starrett, to me known, who, being duly sworn, did depose and say that he resided in the Borough of Manhattan, City of New York, State of New York; that he is the president of the Thompson-Starrett Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

CHARLES M. BECKER,
[L. S.] Notary Public, N. Y. Co.
(1341)

40.—That the Court erred in refusing to admit evidence on behalf of the defendants as follows:

The book of original entry showing dimensions of all stones received by the defendant Graham from the plaintiff.

41.—That the Court erred in refusing to permit the defendant Frank F. Graham to answer under direct examination the following question:

"What was it your intention to do about this Government work?"

42.—That the Court erred in granting the following prayers and each of them offered by the plaintiff (including the plaintiff's nineteenth prayer as amended by the Court):
(1342)

PLAINTIFF'S 2 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the first plea of either of the defendants.

PLAINTIFF'S 3 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the second plea of either of the defendants.

PLAINTIFF'S 4 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the fifth plea of either of the defendants.

PLAINTIFF'S 5 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the sixth plea of either of the defendants.

PLAINTIFF'S 8 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the ninth plea of either of the defendants.

PLAINTIFF'S 9 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the tenth plea of either of the defendants.

PLAINTIFF'S 10 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the eleventh plea of either of the defendants.

PLAINTIFF'S 13 PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the fifteenth plea of the defendant, The Title Guaranty & Surety Company.

PLAINTIFF'S 19 PRAYER (as amended by the Court.)

The plaintiff, the United States of America, prays the Court to instruct the jury that if they find for the plaintiff, the United States of America, in this case, they are to allow as damages the difference between what they may find to have been the reasonable and necessary cost to the plaintiff, the United States of America, for transporting, cutting and delivering the granite mentioned in this case at the south pavilion of the National Museum building in Washington, District of Columbia, and the amount specified in the contract offered in evidence in this case to be paid by the United States to the defendant, Frank F. Graham, for so transporting, cutting and delivering the said granite, the sum allowed, however, not to (1343) exceed the penalty of the bond sued on in this case, namely, fifty thousand dollars, with interest, in the discretion of the jury, from May 25, 1909.

43.—That the Court erred in its refusal to grant the following prayers and each of them, offered by the defendants:

DEFENDANTS' PRAYER NO. 1.

The jury are instructed that in this case the United States occupies the same position as though it were a private individual; and that it is not favored in the law applicable to this case over any such private individual.

DEFENDANTS' PRAYER NO. 2.

The jury are instructed that they are the exclusive judges under the evidence in this case as to what is meant in the contract of October 23, 1906, offered in evidence, by "net dimension blocks."

DEFENDANTS' PRAYER NO. 3.

The jury are the exclusive judges as to what is meant by the words "net dimension blocks" in the specifications constituting a part of the contract of October 23, 1906; and if the jury find from the evidence in this case that large quantities of the granite mentioned in said contract were furnished to said Graham in shapes and sizes which were not "net dimension blocks," and that said shapes and sizes were materially more expensive to said Graham to freight and cut; and that said Graham on or about the eighteenth day of December, 1907, made a demand upon the Superintendent of Construction for (1344) an allowance for such additional freight and cutting on sixty-five car loads of such granite; and that said Superintendent of Construction refused to make any allowance for such additional freight and cutting; and that thereafter about one hundred further car loads of granite were furnished to said Graham; and that such car loads arrived from time to time up to March 7, 1908, or thereabouts, and that large quantities of such granite so furnished continued up to said time to be in shapes and sizes which were materially more expensive to said Graham to freight and cut; and that thereupon the said Graham on or about the said seventh day of March, 1908, ceased to cut the granite so furnished; then, the jury are instructed that the said Graham was justified in so stopping said work; and that under the pleadings in this case, the verdict of the jury must be for the defendants as to the claim of the United States.

DEFENDANTS' PRAYER NO. 4.

If the jury find from the evidence that the defendant Graham at his own expense prepared full and complete sets

of setting plans of the stone work referred to in the contract dated October 23, 1906, offered in evidence, showing fully every separate stone in the work, and that said plans were traced at one quarter inch to the foot scale and were prepared, lettered and numbered as directed by the Superintendent of Construction and that said plans so prepared were delayed in submission to the said Superintendent of Construction by the acts or delays of said Superintendent of Construction or his agents, and not by the acts or defaults of said Graham, and that the granite mentioned in said contract, was not furnished to said Graham in net dimension blocks without unnecessary delay free on board cars at the quarry at Bethel, Vermont, and that said failure on the part of said Superintendent of Construction so to furnish said granite in net dimension blocks without unnecessary delay free on board cars at said quarry resulted in large expenses and losses to said Graham, and that payments were not made to said Graham from time to time as the progress of the work warranted less a percentage of ten per centum reserved from each payment: and that in the winter of 1907 and 1908, after October 1, 1907, the United States delivered and continued to deliver to the defendant Graham quantities of granite, and that said granite was not in net dimension blocks and was in excess of such amount as said Graham could reasonably be expected to cut at that season of the year; and that thereupon in the month of March, 1908, said Graham ceased to cut the granite referred to in said contract; then, their verdict should be for the defendants; and the jury are further instructed in this connection that they are the exclusive judges under the evidence in this case as to what is meant in the contract of October 23, 1906, and the specifications constituting a part thereof, by "net dimension blocks." (1345)

DEFENDANTS' PRAYER NO. 5.

If the jury find from the evidence that the granite mentioned in the contract of October the twenty-third, 1906, offered in evidence, was not furnished to the defendant Graham without unnecessary delay, and that less than eleven thousand cubic feet thereof were furnished to said Graham before October 1, 1907; and that said Graham had lost large sums in waiting for granite to be furnished prior to October 1, 1907; and that between the said first day of October, 1907, and the seventh day of March, 1908, a granite supply was furnished largely in excess of the amount which said Graham could reasonably have been expected to handle and cut at that season; and that the excess of the supply received over the amount which said Graham could reasonably have been expected to cut at said season became and was massed in said Graham's

yards at Baltimore in such amounts as to make it impracticable to work profitably in said yards; and that said Graham thereupon ceased to work on said granite; then, the jury are instructed that said Graham was justified in so doing; and that under the pleadings in this case, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 6.

That according to the true construction of the contract of October 23, 1906, and the specifications constituting a part thereof, the defendant Graham was obliged to furnish setting plans, prepared, lettered and numbered as may be directed by the Superintendent of Construction, and said Graham was obliged to submit such setting plans to said Superintendent of Construction not less than one month prior to the commencement by said Graham of the work on the cutting of the stones represented in such setting plans; and the said contract and specifications do not provide for the furnishing of setting plans or copies thereof to the Quarry at or near Bethel, Vermont.

DEFENDANTS' PRAYER NO. 7.

That the receipts given by the defendant Graham from (1346) time to time for amounts received from the Superintendent of Construction on progress payments are not conclusive evidence of the respective amounts due at the time of such payments; and the jury are to judge from all the evidence whether such payments were all that the progress of the work fairly and reasonably warranted at the time of such payments.

DEFENDANTS' PRAYER NO. 8.

The general instructions and conditions, constituting a part of the contract of October 23, 1906, offered in evidence, provide:

"Payments will be made from time to time as the progress of the work may warrant. A percentage of ten *per centum* will be reserved from each payment until the whole of the cut granite called for by the annexed contract shall have been satisfactorily delivered and accepted;" and the jury are instructed that under this provision, the defendant Graham was entitled to ninety per cent. of such payments from time to time as the progress of the work fairly and reasonably warranted; and the jury are the exclusive judges under all the evidence in this case as to what payments the progress of the work from time to time did fairly and reasonably warrant.

DEFENDANTS' PRAYER NO. 9.

In no event can the United States charge against the contract of October 23, 1906, more than the fair and reasonable value of completing the work mentioned in said contract; and the jury are the exclusive judges as to what is fair and reasonable under the evidence in this case; and if the jury find from the evidence that the fair and reasonable value of the completion of the work mentioned in said contract, should not have exceeded the contract price of one hundred and forty-nine thousand dollars ($149,000) less the sum of fifty-nine thousand four hundred dollars ($59,400) paid to said Graham; then, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 10.

No evidence has been offered legally sufficient to prove the fair and reasonable cost of completing the work mentioned in the contract of October 23, 1906, offered in evidence, in excess of the price in said contract stipulated to be paid to the defendant Graham for the completion of said contract; and the verdict of the jury must, therefore, be for the defendants.
(1347)

DEFENDANTS' PRAYER NO. 11.

That according to the undisputed evidence in this case, the United States has blended and failed to segregate the cost of the completion of the work under contract of October 23, 1906, and the cost of completion of the work under the unexecuted supplemental contract dated March 6, 1908, offered in evidence; and under the pleadings in this case, the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 11½.

If the jury find from the evidence that the Superintendent of Construction did not act in good faith in annulling the contract offered in evidence; then, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 12.

If the jury shall find from the evidence that on the eighteenth day of March, 1908, the Superintendent of Construction, Bernard R. Green, knew that large quantities of the granite stone referred to in the contract of October 23, 1906, had not

been furnished to the defendant Frank F. Graham, without unnecessary delay, and that only about eleven thousand cubic feet of the said granite had been furnished to said defendant on or before October 1, 1907, and that subsequently during the months of December, 1907, January, 1908, and February, 1908, great quantities of said granite had been shipped by the agents and servants of said Superintendent of Construction to the said Graham; and that such shipments on account of the season of the year could not be handled and cut by the said Graham without great additional expense, and that on account of said large shipments the stone-cutting yard of the said Graham had been so overcrowded that the work of cutting stone at that period of the year could not be profitably carried on by the said Graham, and that said Graham was suffering and would suffer serious financial losses on account of said overcrowding; and shall further find from the evidence that the said Superintendent of Construction knew that large quantities of said granite so furnished by his agents were not in net dimension blocks; and that on account of the sizes and shapes of said blocks, said Graham was and would be obliged to pay (1348) considerable sums of money for the freight on the additional stone in said blocks, and for the additional cost of cutting said stone; and shall further find from the evidence that the said Graham, through his attorney, informed the said Superintendent of Construction on or about March 15, 1908, that he had stopped work on the granite work of the south pavilion on account of the damage which, he, Graham, had suffered by reason of the manner in which this matter had been gone on with on the part of the United States and its agents, and that he was ready amicably to adjust the matter on a fair and equitable basis between the parties; and shall further find from the evidence that said Superintendent of Construction told the Secretary of the Smithsonian Institution at or about the time at which he requested the said Secretary to sanction the annulment of said contract that the said Graham had thrown up his contract; then the jury are instructed that the said Superintendent of Construction did not act in good faith in seeking to annul said contract with the sanction of the said Secretary as representing the Regents of the Smithsonian Institution on March 18, 1908; and that under the pleadings, their verdict must be for the defendants.

DEFENDANTS' PRAYER NO. 13.

That according to the undisputed evidence, the work mentioned in the contract of October 23, 1906, was materially altered in that it was completed according to the following supplemental contract:

"SUPPLEMENTAL CONTRACT,

Made and concluded this sixth day of March, nineteen hundred and eight, by and between Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, State of Maryland, of the second part:

Witnesseth, that whereas, a contract has heretofore been entered into between the parties hereto on the twenty-third day of October, nineteen hundred and six, for transportation from quarry, cutting, furnishing, and delivering at the site of the new building for the National Museum, in Washington, District of Columbia, the cut granite required for the south pavilion above the first floor level of the said building, for the gross sum of one hundred forty-nine thousand dollars ($149,000.00), and whereas, by reason of changes found desirable in the details of the design of the said cut granite by which the diameter of the drum of the dome is increased from 80 feet to 84 feet, the breadth of the column and pilaster caps increased to suit the sculptor's models, certain cornice courses increased in depth for greater stability of the wall, and panel stones of granite inserted in the U course, the said party of the first part has agreed and by these presents does agree, with the said party of the second part, for himself, his heirs, executors, and administrators, for and in consideration of the said changes, to pay to the party of the second part the sum of four thousand dollars ($4,000.00) additional to the consideration in the said contract of October 23, 1906, increasing the sum total of the said contract to one hundred and fifty-three thousand dollars ($153,000.00).

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.
(1349)

_____,
Superintendent of Construction.

Witnesses:

_____, [Seal]

_____,

_____,

(Executed in triplicate.)

The Title Guaranty & Surety Co. of Scranton, Pa., the surety on the bond attached to the contract of October 23, 1906, between Bernard R. Green, Superintendent of Construction, and Frank F. Graham, for furnishing and delivering cut granite for the south pavilion of the building for the National Museum, which bond is dated the twenty-sixth day of October,

1906, does hereby consent to the change in said contract above named, and does hereby agree that said change shall not affect its liability on said bond in any manner whatever.

In witness whereof, the said The Title Guaranty & Surety Co. of Scranton, Pa., has placed its hand and caused its seal to be attached hereto this day of March, nineteen hundred and eight.

Approved , 1908, for the Regents of the Smithsonian Institution.

By ————————, Secretary."

And that said contract was never executed; and that the changes mentioned therein were never assented to by The Title Guaranty & Surety Company; and the verdict of the jury, under the pleadings in this case, must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 14.

That according to the undisputed evidence in this case, the work under the contract of October 23, 1906, was materially altered; and under the pleadings in this case, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 15.

(1350) Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the plaintiff to recover; and the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 16.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the United States to recover against either of the defendants; and the verdict of the jury must, therefore, be for said defendants.

DEFENDANTS' PRAYER NO. 17.

No evidence has been offered legally sufficient to prove that the Superintendent of Construction annulled the contract, offered in evidence, with the sanction of the Regents of the Smithsonian Institution; and the verdict of the judgment, therefore, under the pleadings in this case, be for The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 18.

That according to the undisputed evidence, the work mentioned in the contract of October 23, 1906, was materially

altered in that it was completed according to the following supplemental contract:

"SUPPLEMENTAL CONTRACT,

Made and concluded this sixth day of March, nineteen hundred and eight, by and between Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, State of Maryland, of the second part:

Witnesseth, that whereas, a contract has heretofore been entered into between the parties hereto on the twenty-third day of October, nineteen hundred and six, for transporting from quarry, cutting, furnishing, and delivering at the site of the new building for the National Museum, in Washington, District of Columbia, the cut granite required for the south pavilion above the first floor level of the said building, for the gross sum of one hundred forty-nine thousand dollars ($149,000.00), and whereas, by reason of changes found desirable in the details of the design of the said cut granite by which the diameter of the drum of the dome is increased from 80 feet to 84 feet, the breadth of the column and pilaster caps increased to suit the sculptor's models, certain cornice courses increased in depth for greater stability of the wall, and panel stones of granite inserted in the U course, the said party of the first part has agreed and by these presents does agree, with the said party of the second part, for himself, his heirs, executors, and administrators, for and in consideration of the said changes, to pay to the party of the second part the sum of four thousand dollars ($4,000.00) additional to the consideration in the said contract of October 23, 1906, increasing the sum total of the said contract to one hundred and fifty-three thousand dollars ($153,-
(1351) 000.00).

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

_____,
Superintendent of Construction.

_____, [Seal]

Witnesses:

_____,

_____,

(Executed in triplicate.)

The Title Guaranty & Surety Co. of Scranton, Pa., the surety on the bond attached to the contract of October 23, 1906, between Bernard R. Green, Superintendent of Construction, and Frank F. Graham, for furnishing and delivering cut granite for the south pavilion of the building for the National Museum, which bond is dated the twenty-sixth day of October, 1906, does hereby consent to the change in said contract above named, and does hereby agree that said change shall not affect its liability on said bond in any manner whatever.

In witness whereof, the said The Title Guaranty & Surety Co. of Scranton, Pa., has placed its hand and caused its seal to be attached hereto this day of March, nineteen hundred and eight.

Approved , 1908, for the Regents of the Smithsonian Institution.

By ——————, Secretary."

and that said contract was never executed; and that the changes mentioned therein were never assented to by The Title Guaranty & Surety Company; and the verdict of the jury, under the pleadings in this case, must, therefore, be for the said The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 19.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the United States to recover against The Title Guaranty & Surety Company; and the verdict of the jury must, therefore, be for the said defendant. (1352)

DEFENDANTS' PRAYER NO. 20.

No evidence has been offered legally sufficient to prove that the Superintendent of Construction annulled the contract, offered in evidence, with the sanction of the Regents of the Smithsonian Institution; and under the pleadings in this case, the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 21.

That according to the undisputed evidence in this case, the work under the contract of October 23, 1906, offered in evidence, was so materially altered, without the assent of the surety, as to relieve the said surety on the bond from liability; and the verdict of the jury, must, therefore, be for The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 22.

That if the jury find from the evidence that the acts of the United States and the Thompson-Starrett Company prevented the defendant Graham from freighting, cutting, boxing and delivering complete to the United States all of the Bethel granite required for part "C" of the pavilion, mentioned in the contract and specifications offered in evidence, before October 1, 1907; and that the United States without taking any further action in the premises under said contract, and after knowing the work under said contract was not completed before October 1, 1907, and without notice to The Title Guaranty & Surety Company, through its Superintendent of Construction, permitted said Graham to proceed on said work till March, (1353) 1908, and that the United States accepted said work from October 1, 1907, to March, 1908; then their verdict must be for The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 23.

That if the jury find from the evidence that there was unnecessary and unreasonable delay on the part of the United States in delivering granite stock to the defendant Graham free on board the cars at the quarry at or near Bethel, Vermont, and that said delay alone rendered it impossible for the said Graham to complete his contract by October 1, 1907; and that The Title Guaranty & Surety Company was not notified by the United States of such delay at any time before October 1, 1907; then, the verdict of the jury must be for The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 24.

That if the jury find from the evidence that a substantial portion of the necessary granite stock was not furnished to the defendant Graham in net dimension blocks free on board cars at the quarry at or near Bethel, Vermont, and that the said Graham was without fault in the premises; then, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 25.

No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case; and the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 26.

No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case against The Title Guar-

anty & Surety Company; and the verdict of the jury must, therefore, be for the said defendant.

44.—That the Court erred in using in its charge to the jury the language set forth in the following eighteen paragraphs and each of them:

First Paragraph.

"There obviously must be some excess of sizes, in order that the stone cutter can dress down the stone to the exact size and shape required to produce the surface on the stone called for."

Second Paragraph.

"That dimension blocks are those furnished by the quarry in sizes and dimensions from which the stone cutter can produce the desired stone of the dimension required by the setting plan."
(1354)

Third Paragraph.

"What was understood by the parties to this contract to be meant by net dimension blocks is for you to determine from the weight of all the evidence which you have heard."

Fourth Paragraph.

"You must try to determine what was the meaning in this contract and if you can, you should reconcile this wide difference between the witnesses."

Fifth Paragraph.

"Mr. Graham has said, I think you will recall, that it was not expected that the blocks described as net dimension should be either sawed or cut before he received them, but might run 2 or 3 inches in excess of the dressed stone and that the rough stone should not average more than 225 pounds to the cubic foot of dressed measurement and should be often something less."

Sixth Paragraph.

"Now, it is for you to say whether on a fair average the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulation was understood by the parties to the contract."

Seventh Paragraph.

"If you find that the stone furnished from the quarry was on a fair average, such as the contract as so understood called for, then Graham could not rightfully, on account of the sizes of the stone, abandon his contract."

Eighth Paragraph.

"On February 10, 1908, Mr. Graham wrote to Mr. Green that he intended to devote his yard to the contract, the payments to be made to him as previously which tends to show that up to that time although there had been complaints of the roughness of the stone, it may have been on the whole average such as would gratify the contract."

Ninth Paragraph.

"It is generally important to find out with regard to such (1355) a contract what interpretation the parties themselves put upon it when working under it. How they by their acts show that they understood it."

Tenth Paragraph.

"And the Government has the right to require from Graham rightful compliance with his contract whether profitable to him or not and to require that the surety shall answer under its bond for his defaults."

Eleventh Paragraph.

"For that possibly may be the very reason why Graham failed to complete it."

Twelfth Paragraph.

"But the proof is that, in point of fact, Graham did stop work, discharged his men and told them to look for other employment, and he did not intend to go on with the work until he got some terms from the Government, the terms of which we do not know."

Thirteenth Paragraph.

"It was said and there was no proof to the contrary, that the practice is to leave all matters of d tail and matters such as this to the Secretary of the Institution. For a long time, they have allowed him to exercise those powers."

Fourteenth Paragraph.

"Mr. Green stated that in his judgment the contract should be annulled because of the failure of the defendant, and therefore the annulment was made. I can see no ground for saying to the jury that the contract was not annulled."

Fifteenth Paragraph.

"The Secretary, acting for the Regents, gave his consent to the annulment in the proper manner."

Sixteenth Paragraph.

"There is no evidence in my judgment to show that the annulment was the result of any bad faith on the part of Mr. Green. Mr. Green has acted within his rights, and as the agent of the Government, it was his duty to protect the interests of the Government. I do not think that he has gone beyond the limits of his power."
(1356)

Seventeenth Paragraph.

"If the stone was ready for delivery on board the cars in advance of the cars being furnished to receive it and if the Government, by its agents, made all reasonable efforts to see that cars were furnished, then the defendant Graham was not justified in abandoning his contract, even though the cars came irregularly and not promptly."

Eighteenth Paragraph.

"The Government, by its contract, did not bind itself to furnish transportation for the stone, it was to be delivered to Graham at Bethel at the quarry and was after that at his risk and cost of transportation until delivered by him at the government grounds at Washington."

45.—That the Court erred in using in its subsequent instructions to the jury during the argument of counsel for the defendants (Mr. Harley), who was interrupted for that purpose, the language embraced in the following six paragraphs and each of them:

First Paragraph.

"I have said more than once it was not the duty of the Government to furnish the cars. I have said that I thought

it was the duty of the Government to co-operate with the parties who were shipping the stone in a reasonable manner, in order to facilitate the shipment. The furnishing of the cars was at the risk of Graham. I do not see that that letter throws any light on the furnishing of the cars." (Referring to the letter of February 8, 1908, from Bernard R. Green, Superintendent of Construction, to Thompson-Starrett Company.)

Second Paragraph.

"In a contract of that kind, I think there was an obligation on both parties to furnish cars—that reasonable efforts should be made to accommodate each other."

Third Paragraph.

"I say to you and to the jury that there is no evidence of delay, because the cars were not furnished. It was not the duty of the Government to furnish the cars."
(1357)

Fourth Paragraph.

"I have said that the question of delay should be ruled out of the case. Graham never raised the question of delay. They never charged him with default because it was not delivered up to the time."

Fifth Paragraph.

"I do not think there is evidence upon which the jury would be allowed to say that Graham was justified in abandoning the contract on account of delay in the delivery of the stone. I do not think that can be shown. You may argue upon the fact of the difficulties of proceeding with the contract, because of the excessive weight of the stone and the way in which it was delivered at the quarry. That may be dwelt upon; but as a distinct issue, that the jury may find against the Government, because the stone was not delivered in time, I have said there was no sufficient evidence."

Sixth Paragraph.

"I ought not to let the jury find against the Government now, because of delay in furnishing the stone, because there never was an issue distinctly raised. Graham said 'I am going on now. I am going to devote my whole yard to the performance of the contract.' That letter which Graham writes urging upon the quarryman to furnish the stone, I do not understand that that means they made no efforts."

46.—That the Court erred in permitting the United States' Attorney for the District of Maryland (Mr. Hill) during his closing argument before the jury, to read, over and against the objections of the defendants, from the letter head of a certain letter which was in evidence, as will more fully appear from assignments of errors Nos. 14, 15 and 17, the words following:

"Fidelity Judicial. We issue surety bonds. Contract Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and surplus over $1,000,000.00," and to say immediately thereafter "There is no room for sympathy for the poor defendant in this case."

47.—That the Court erred in entering judgment against the plaintiffs in error.

(1358) Wherefore, the said Frank F. Graham and The Title Guaranty & Surety Company, and each of them, pray that the judgment in said cause, for the errors aforesaid, may be reversed by the United States Circuit Court of Appeals for the Fourth Circuit.

GEORGE R. GAITHER,
Attorney for Frank F. Graham.
CHARLES F. HARLEY,
Attorney for The Title Guaranty & Surety Company.

WRIT OF ERROR BOND.

(1359) Filed August 24, 1910.

Know all men by these presents, That we, The Title Guaranty and Surety Company, a body corporate, as principal, and The Fidelity and Deposit Company of Maryland, a body corporate, as surety, are held and firmly bound unto The United States of America in the full and just sum of sixty thousand dollars ($60,000) to be paid to the said United States of America, its certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, and our successors, jointly and severally, by these presents. Sealed with our seals and dated this 24th day of August in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of the United States for the District of Maryland, in a suit depending in said court, between the United States of America, plaintiff, and Frank

F. Graham, and The Title Guaranty and Surety Company, defendants, a judgment was rendered against the said Frank F. Graham and The Title Guaranty and Surety Company and the said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the day named in said citation.

Now, the condition of the above obligation is such, That if the said Title Guaranty and Surety Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make it plea good, then the above obligation (1360) to be void; else to remain in full force and virtue.

THE TITLE GUARANTY AND SURETY COMPANY,

By B. P. KEATING, its Vice-President.

Attest:

J. H. LAW,

Secretary of The Title Guaranty and Surety Company.

[Corporate Seal T. G. & S. Co.]

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

By J. A. NELSON, Vice-Prest.

Attest:

THOS. L. BERRY, Asst. Secy.

[Corporate Seal F. & D. Co. of Md.]

Sealed and delivered in presence of:

This bond is approved.

THOS. J. MORRIS, Judge.

WRIT OF ERROR.

UNITED STATES OF AMERICA, } *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Maryland—Greeting:

(1361) Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit

Court, before you, or some of you, between The United States of America, plaintiff, and Frank F. Graham and The Title Guaranty and Surety Company, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the 22nd day of September, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, this twenty-fourth day of August, in the year of our Lord one thousand nine hundred and ten.

[Seal of Court]

ARTHUR L. SPAMER,
Clerk of the said Circuit Court of the United States
for the District of Maryland.

Allowed by—

THOS. J. MORRIS, Judge.

CITATION

UNITED STATES OF AMERICA, } *ss:*

The President of the United States to The United States of America—Greeting:

(1362) You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 22nd day of September, 1910, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Maryland wherein Frank F. Graham and The Title Guaranty and Surety Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ

of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Thomas J. Morris, Judge of the {Seal of Court} said Circuit Court of the United States this twenty-fourth day of August, in the year of our Lord one thousand nine hundred and ten.

THOS. J. MORRIS, Judge.

Attest:

ARTHUR L. SPAMER,
Clerk U. S. Circuit Court for District of Maryland.

Service of the within citation acknowledged this 30th day of August, 1910.

JOHN PHILIP HILL,
U. S. Attorney.

PETITION OF PLAINTIFFS IN ERROR AND ORDER OF COURT THEREON EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL WITH THE CLERK OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(1363) Filed September 7, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff,
vs.
Frank F. Graham, and The Title Guaranty and Surety Company, a body corporate, Defendants.

To the Honorable Judges of said Court:

The petition of the plaintiffs in error or appellants in this case respectfully shows unto your Honor:

1. That this Honorable Court has granted to your petitioners the writ of error in this case.

2. That the citation has been made returnable, according to the fifth paragraph of the fourteenth rule of the United States Circuit Court of Appeals for the Fourth Circuit, on the twenty-second day of September, 1910.

3. That according to the sixteenth rule of the United States Circuit Court of Appeals for the Fourth Circuit, it is the duty of the plaintiffs in error or appellants to docket this case and file the record thereof with the clerk of the appellate court by or before said return day.

4. That by working all the summer and on holidays and at nights counsel for the plaintiffs in error or appellants have been able to prepare the record for filing, and they have now done everything that is necessary in the premises.

(1364) 5. That they do not need or require any extension of the time under said sixteenth rule of the appellate court, but they are aware that it will be absolutely impossible for the attorney for the United States of America to examine the record in this case within the time allowed by the rules.

6. That they are furthermore aware that it would be absolutely impossible for the clerk of this court to perform his duties in this case in which a record of from twelve hundred to fifteen hundred pages are involved within two or three months.

7. That while the plaintiffs in error or appellants do not need an extension of the time for their own benefit, it will be absolutely necessary to grant an extension for the benefit of the attorney of the United States of America and the clerk of this court that they may have an opportunity to perform their duties in the premises.

Your petitioners, therefore, pray that this Honorable Court, who signed the citation in this case, may enlarge the time for filing the record thereof with the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, the said order of enlargement to be filed with the clerk of said appellate court.

And as in duty bound, etc.

GEORGE R. GAITHER,
CHARLES F. HARLEY,
Attorneys for the plaintiffs in error or appellants.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

(1365)

United States of America, Plaintiff,
vs.
Frank F. Graham, and The Title Guaranty and Surety Company, a body corporate, Defendants.

Upon the foregoing petition, it is, this 7th day of September, 1910, ordered by the Circuit Court of the United States for the District of Maryland that the time for docketing the above entitled case and filing the record thereof with the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit be, and it is hereby enlarged and extended until the first day of November, 1910; and it is further ordered that this order of enlargement be filed with the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit.

THOS. J. MORRIS, Judge.

CERTIFIED COPY ORDER OF COURT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND IN THE MATTER OF FRANK F. GRAHAM, BANKRUPT.

(1366) Filed October 25, 1910.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

In the matter of
Frank F. Graham,
A Bankrupt. } In Bankruptcy.

Ordered by the District Court of the United States for the District of Maryland, sitting in bankruptcy, this 24th day of October, 1910, that Burdette B. Webster, trustee for Frank F. Graham, bankrupt, be, and he is hereby authorized and directed to enter his appearance in the case of the United States of America against Frank F. Graham and The Title Guaranty & Surety Company, in the United States Circuit Court for the District of Maryland and defend it until final judgment and prosecute as trustee the appeal to the United States Circuit Court of Appeals for the Fourth Circuit with

like force and effect as though said appeal had been commenced by the said trustee; and it is further ordered that a copy of this order, duly authenticated by the clerk of this court, be filed in the said case of the United States of America against Frank F. Graham and The Title Guaranty & Surety Company, a body corporate, in the United States Circuit Court for the District of Maryland.

THOS. J. MORRIS,
District Judge.

UNITED STATES OF AMERICA,
District of Maryland, } to-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of an order of court which was entered and filed on the 24th day of October, 1910, in the therein entitled matter of Frank F. Graham, Bankrupt, No. 2090 Bankrupt Docket "I," in said District Court.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 25th day of October, 1910.

[Seal of Court] ARTHUR L. SPAMER, Clerk.

ORDER OF COURT EXTENDING TIME FOR FILING THE TRANSCRIPT OF RECORD WITH THE CLERK OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(1367) Filed October 27, 1910.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff,
vs.
Frank F. Graham, and The Title Guaranty and Surety Company, a body corporate, Defendants.

Upon the application of the attorney for the United States of America, it is, this 27th day of October, 1910, ordered by the Circuit Court of the United States for the District of

Maryland that the time for docketing the above entitled case and filing the record thereof with the Clerk of the United Sates Circuit Court of Appeals for the Fourth Circuit be, and it is hereby enlarged and extended until the 21st day of November, 1910; and it is further ordered that this order of enlargement be filed with the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit.

THOS. J. MORRIS, Judge.

ORDER OF COURT EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD WITH THE CLERK OF THE U. S. CIRCUIT COURT OF APPEALS.

(1368) Filed November 17, 1910.

IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MARYLAND.

United States of America, Plaintiff,
vs.
Frank F. Graham, and The Title Guaranty & Surety Company, a body corporate, Defendants.

Upon the representation of the clerk, that he needs additional time in which to complete the making up of the Transcript of Record in the above entitled case for filing in the United States Circuit Court of Appeals for the Fourth Circuit,

It is ordered this 17th day of November, 1910, that the time for docketing the above entitled case and filing the record thereof with the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, be and it is hereby enlarged and extended until the 30th day of November, 1910,

And it is further ordered, that this order of enlargement be filed with the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit.

THOS. J. MORRIS, Judge.

ORDER TO TRANSMIT RECORD.

(1369) In pursuance of the writ of error aforesaid, and according to the statute in such case made and provided, and of the order of court here, a record of the judgment aforesaid with

all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, accordingly.

Test: ARTHUR L. SPAMER, Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Maryland, } to-wit:

I, Arthur L. Spamer, Clerk of the Circuit Court of the United States for the District of Maryland, do certify that the foregoing is a true transcript of the record and proceedings of the said court, together with all things thereunto relating, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix {Seal of Court} the seal of the said Circuit Court, this 19th day of November, 1910.

ARTHUR L. SPAMER, Clerk.

And on the same day, to-wit, November 23, 1910, three orders extending the time to file the record are filed.

And on the same day, to-wit, November 23, 1910, the appearance of Charles F. Harley, John B. A. Wheltle and Burdette B. Webster, for the plaintiffs in error, is entered, order filed.

Afterwards, to-wit, on December 1, 1910, the appearance of John Philip Hill, United States Attorney, and J. Craig McLanahan, Assistant United States Attorney, for the defendant in error, is entered, order filed.

Afterwards, to-wit, on December 24, 1910, twenty copies of the printed record are filed.

At the February Term, 1911, of our said Circuit Court of Appeals, to-wit, on the 20th day of February, 1911, the said cause came on to be heard and was argued by counsel before Pritchard, Circuit Judge, and Dayton and Connor, District Judges, and submitted.

Order to Pay Government Custodian of Papers as Witness.

Filed March 30, 1911.

United States Circuit Court of Appeals, Fourth Circuit, February Term, 1911, Richmond, Va.

It appearing to the Court, that J. Q. Sheehy, of Washington, D. C., a government employee, attended the sessions of this Court as the Chief Clerk, Superintendent of Construction, Library of Congress, as the custodian of certain original documents deem s- necessary for consideration in the disposition of the case of Frank F. Graham and The Title Guaranty and Surety Company, vs. The United States, at Richmond, Va., on February 19th, 20th and 21st, 1911, and incurred personal expenses amounting to twenty-six dollars and twenty cents ($26.20) and that the same has not been paid.

Therefore, It is hereby ordered that the Marshal for the Eastern District of Virginia, be directed to pay the said J. Q. Sheehy, of Washington, D. C., the sum of twenty-six dollars and twenty cents ($26.20) for expenses above stated.

March 30, 1911.

NATHAN GOFF,
Senior Circuit Judge.

Afterwards, at the May Term, 1911, to-wit, on the 19th day of June, 1911, the Court here announced and filed its opinion, which is as follows, to-wit:—

Opinion.

Filed June 19, 1911.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1014.

FRANK F. GRAHAM and THE GUARANTY AND SURETY COMPANY, Plaintiffs in Error,
versus
THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

[Argued February 20, 1911; Decided June 19, 1911.]

Before Pritchard, Circuit Judge, and Dayton and Connor, District Judges.

Charles F. Harley (George R. Gaither, John B. A. Wheltle, and Burdette B. Webster on the brief) for plaintiff in error, and John Philip Hill, United States Attorney, and J. Craig McLanahan, Assistant United — Attorney, for defendant in error.

In the Sundry Civil Appropriation Act, approved March 3, 1903, Congress enacted:

"To enable the Regents of the Smithsonian Institution to commence the erection of a suitable fire-proof building with granite fronts, for use of the National Museum, to be erected on the north side of the Mall, between Ninth and Twelfth streets, Northwest, substantially in accordance with the plan A, prepared and submitted to Congress by the Secretary of the Smithsonian Institution under the provisions of the Act approved June twenty-eighth, nineteen hundred and two, two hundred and fifty thousand dollars. Said building complete, including heating and ventilating apparatus and elevators, shall cost not to exceed three million five hundred thousand dollars, and a contract or contracts for its completion is hereby authorized to be entered into subject to appropriations to be made by Congress. The construction shall be in charge of Bernard R. Green, Superintendent of Buildings and Grounds, Library of Congress, who shall make the contracts herein authorized and disburse all appropriations made for the work, and shall receive as full compensation for his services hereunder the sum of two thousand dollars annually in addition to his present salary, to be paid out of said appropriations."

On October 23, 1906, Frank F. Graham entered into a contract with Bernard R. Green, "acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States

of America", whereby he, Graham, agreed to "transport from the quarry, cut, box and deliver complete, all the Bethel granite", to be furnished by Green "free on board cars at the quarry at Bethel, Vermont, required for that portion of the South Pavilion above the first floor level of the said building for the National Museum in Washington, District of Columbia, described as part 'C' in the specifications, the drawings therein referred to, and the instructions and general conditions, all for the gross sum of one hundred and forty nine thousand dollars". To secure the performance of his contract Graham executed bond in the penalty of $50,000.00 with the Title Guaranty and Surety Company as surety. This contract among other things provided that if Graham failed "to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then Green or his successor legally appointed should have power with the sanction of the Regents of the Smithsonian Institution to annul this contract by giving notice in writing to that effect" to Graham. That the United States should have the right to recover whatever sums might be required to complete the contract after such annulment, in excess of Graham's contract price and apply to such completion of the work any sum not paid over to Graham at the time for work done by him. On March 18, 1908, Green, alleging that Graham had stopped work and failed to prosecute it faithfully and diligently as the contract required, gave notice to Graham in writing of its annulment and subsequently the work was done and completed by the Government under Green's supervision at a cost in excess of Graham's contract price, after taking into account prior payments, of $56,080.75. Thereupon the United States instituted this suit upon Graham's bond and after a protracted jury trial, on June 25, 1910, secured a verdict for $50,000 against Graham and the Surety company, upon which verdict judgment was entered by the court on June 28, 1910, for said sum of $50,000.00 and $280.19 costs of suit. To this judgment this writ of error has been sued out.

DAYTON, *District Judge* (after stating the facts as above):

Graham filed some fourteen and the surety company fifteen pleas in defense of this suit. The first fourteen filed by the surety company are substantially the same as those filed by Graham, and both sets could have been well reduced to four, one the general issue, the other three setting forth the charges: First, that the contract was not annul-ed lawfully by Green; Second, that Green had not performed the conditions of the contract required of him in the furnishing of the granite properly to Graham, whereby and by reason whereof he had broken the contract, and Graham was entitled to abandon it; Third, that the expenditures after annulment of the contract by Green in the completion of the work were not reasonable and fair. The fifteenth plea filed specially by the surety company set forth that, without its knowledge and assent, material alterations had been made in the contract, whereby it became released of its surety obligation. Thus analyzed it will be perceived that of these three substantial defenses, other than the general issue, set up by these defendants jointly in their multitude of pleas, the last two

presented wholly questions of fact which were proper to be submitted to the jury under instructions of the court. During the course of the trial, extended over some twenty-eight days, thirty-nine separate bills of exception were taken and forty-seven assignments of error are now here made.

It could hardly be expected of us to consider these exceptions and assignments in detail. The great majority relate to the action of the court in admitting and refusing testimony, and to remarks of the court and opposing counsel in the course of trial. Especial stress is here made by counsel in argument and brief on the fact that the Government's counsel was permitted to introduce in evidence written communications from the surety company, which set forth upon their printed heads the fact that its capital and surplus was over $1,000,000.00, because it is asserted in the brief that "it is difficult for a person, natural or artificial, to secure a fair trial in a case of this kind against the United States, and the line against evidence and argument of this character should be fairly and firmly drawn." We are not prepared to concur in the assertion of fact contained in this proposition. Nor can we quite see what line can be firmly drawn against the introduction of a letter headed communication which letter head has been promulgated, published and used by the surety company for no other purpose that we can conceive of than that of furnishing a brief, accurate description of itself, its address, its responsible officers, the nature of its business and its financial ability to conduct such business, and it is far from clear to us how the defendant could be prejudiced by this its own act, especially before a jury charged as in this case by the court that "the same principles of right and justice which prevail between individuals should control the construction and carrying out of contracts between the Government and those who contract with it or its agents." A careful examination of all this kind of exceptions has convinced us that they present no just ground of complaint on the part of the defendant and they will be dismissed without further consideration. Others of these exceptions relate to the refusal of the court to give the jury twenty seven special instructions or special prayers. The number of these was calculated to confuse and mislead the jury as a number were not at all warranted by the evidence. The court, we think, very wisely, concluded to give a general charge covering the matters in controversy and, so far as we can see, fairly and impartially submitted to the jury the determination of the facts in dispute.

In this view of the matter but few legal propositions remain in the case for us to consider. First, Under the terms of the contract, was the obligation upon Green, acting for the Government, to furnish Graham with the railroad cars necessary for the transportation of the granite blocks from the quarry in Vermont to his yard in Maine?

The contract, as hereinbefore stated, required Graham to "transport from the quarry, cut, box and deliver complete" the granite which was to be furnished by Green "free on board cars at the quarry". At the beginning a car famine existed and Graham com-

plained of the delay resulting therefrom. It is insisted that Green's obligation to deliver the granite "free on board the cars" required him to furnish the cars. On the other hand, it is insisted that Graham's obligation "to transport from the quarry, cut, box and deliver complete" required him to furnish the cars.

The court seems to have taken a middle ground and told the jury that "in a contract of that kind, I think there was an obligation on both parties to furnish cars, that reasonable efforts should be made to accommodate each other."

It seems to us, without entering into an extended discussion of the question, that the lower Court's construction of the law was very fair and liberal to defendants, for the general rule is pretty well established that where the goods are bought f. o. b. cars the obligation is upon the buyer to furnish the cars necessary in transportation. See 35 Cyc., 197 and authorities cited; also note to Samuel M. Lawler & Sons Co., v. Albert Mackie Grocery Co., in 62 L. R. A., 795, where the proposition is discussed. A sound reason for this rule is apparent. The transportation company becomes by law agent or bailee of the buyer, in consequence the buyer, under all ordinary conditions and in the absence of contract provisions to the contrary, should be permitted to select the agent of his choice. It is true that this general rule may be shown to have been modified or reversed by the agreement or conduct of the parties but there is nothing in the case here to cause us to believe that it was. But aside from this, Graham, if he desired to rely upon this delay as ground for abandonment of his contract, was required to act promptly at the time. For some months he complained of it, then, the car famine being over and the stone arriving in large quantities, he proceeded with the work and did a large part of it. This must be held in any event to be a waiver of any right he had, if any, to rescind.

Second. Was this contract legally annulled by Green, whereby he was authorized on behalf of the Government, to finish the work at the contractor's cost?

It is most earnestly insisted by counsel for these defendants that it was not because, it is alleged, the rescission was not made "with the sanction of the Regents of the Smithsonian Institute."

It seems clear from the evidence that Graham proceeded with the work he had contracted to do during the whole time limit of the contract and until it had, by tacit consent, been extended by Green for some months, then he discharged his men and told them to seek other employment, was requested by Green by letter to proceed with the work to the completion of the contract and replied, through his attorney, that he had stopped work "for his financial welfare in view of the fact of the damage he has sustained * * * by reason of the manner in which this matter has been gone on with on the part of the Government, and their agents in the matter." This was on March 14, 1908. On February 10, 1908, he had stated in a letter to Green, "I intend to devote my entire yard to Museum work, until I see the job about completed." It is true that in his attorney's letter, from which we have first above quoted, the statement is made that "if this matter can be in anyway amicably adjusted he should be

glad to do anything that may be fair and equitable between the parties." What did he mean by this adjustment, the completion of the contract? Hardly, for he had discharged the men by whom the work would have had to be done and told them to seek other employment. Could he have meant anything else than that he had thrown up the contract, but was ready to compromise and adjust his claim of damages for delays, for changes, for larger stone furnished under the terms "net dimension blocks" and for times of payment? If this question is to be answered in the negative, then here was a clear abandonment of the contract which rendered its annulment by Green unnecessary. It must have been known by Graham that his remedy after having gone on so far toward the execution of the contract, was not in its abandonment, but in its completion and the assertion afterward of claim for extra compensation because of such damages for which the Court of Claims was open to him to seek recovery.

But, in addition to this, it is argued with much force by counsel for the Government that the clause in the contract limiting Green's authority to annul only with the consent of the Regents of Smithsonian Institute was void because the Act of Congress conferred upon Green, and Green alone, the power to contract and he had no authority to either delegate to or share with any other this power, all of which it was incumbent upon Graham by law to take notice of at the time of contracting. In sup-ort of this contention the case of Whiteside, et al., v. United States, 93 U. S., 247, is cited, where at pages 256-7 it is said:

"Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government. Story's Agency (6th ed.), sect. 307*a*; Lee v. Munroe, 7 Cranch, 376.

"Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combination or collusion, might be turned to the detriment and injury of the public. Mayor v. Schback, 17 Md., 282.

"Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. State v.

Hayes, 52 Mo., 578; Delafield v. State, 26 Wend. 238; People v. Bank, 24 id., 431; Mayor v. Reynolds, 20 Md., 10."

But aside from all this, after carefully considering all the testimony and facts relating to this matter, we prefer determining it squarely upon the grounds and for the reasons given by the court below. In its charge it said: "The proof is that the Regents are a body of men who are constantly occupied, including the Chief Justice of the United States Supreme Court, the Vice President of the United States and United States Senators, and these men do not meet over three times a year, when they probably discuss and determine the general policies of the Institution. It was said, and there was no proof to the contrary, that the practice is to leave all matters of detail and matters such as this to the Secretary of the Institution. For a long time they have allowed him to exercise those powers. Could it be said now that he has not the right to exercise those powers and that the parties who deal with him in this way are not dealing with the proper person? The Secretary, acting for the Regents gave his consent to the annulment in the proper manner. Mr. Green stated that in his judgment the contract should be annulled because of the failure of the defendant and therefore the annulment was made. I can see no ground for saying to the jury that the contract was not annulled. I grant those prayers which say that there is no evidence to support the plea that the annulment was without the sanction of the Regents of the Smithsonian Institute. There is no evidence, in my judgment, to show that the annulment was the result of any bad faith on the part of Mr. Green. Mr. Green has acted within his rights, and as the agent of the Government it was his duty to protect the interests of the Government. I do not think he has gone beyond the limits of his powers."

Finally, were such changes and alterations made in the contract without the surety company's consent as maintained in its special defense in this regard and which entitled it to release from its surety obligation?

This question, although elaborately argued, will need but brief consideration. The contract which the surety company guaranteed performance of in express terms provided that changes and modifications could be made and compensation should be allowed for extra work performed or material furnished. These changes and alterations were provided to be required in writing, it is true, and the letters produced in evidence between Green and Graham seem to us to be sufficient to meet all requirements in this particular. It is also shown that Graham and Green agreed on a sum of $4,000.00 for extra compensation for the extra labor performed and that he was given credit for this sum. In Atlantic Trust and Deposit Co. v. Town of Laurinburg, 163 Fed., 690, 90 C. C. A., 274, this court has determined that the rule of strictissimi juris will not be recognized as applying to contracts underwritten by these bonding corporations whose business it is to insure, for a momentary consideration, the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be re-

leased, it must show that the changes made in the contract guaranteed by it, operated injuriously to affect its right and liabilities.

We agree fully with the court below that there is no evidence in this case to support such plea.

There is no error in the judgment of the court below and it will therefore be

Affirmed.

And on the same day, to-wit, June 19, 1911, the Court here made and entered the following judgment, to-wit:

Judgment.

Filed and Entered June 19, 1911.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1014.

FRANK F. GRAHAM and THE TITLE GUARANTY AND SURETY COMPANY, a Body Corporate, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Maryland.

This Cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby affirmed.

June 19, 1911. J. C. PRITCHARD.

Petition of Plaintiffs in Error for Stay of Mandate.

Filed June 22, 1911.

In the United States Circuit Court of Appeals for the Fourth Circuit.

No. 1014.

FRANK F. GRAHAM and THE TITLE GUARANTY AND SURETY COMPANY, Plaintiffs in Error,

versus

THE UNITED STATES OF AMERICA, Defendant in Error.

* * * * * * *

To the Honorable Judges of said Court:

Now come the plaintiffs in error, and each of them, and move the Court that the mandate in this case be stayed, for the following reasons:

1. Because they, and each of them, have an absolute right of appeal by statute to the Supreme Court of the United States.
2. Because they, and each of them, will take an appeal to the said Supreme Court of the United States.
3. Because the record in this case is unusually long; and it will necessarily require some time to prepare and perfect their appeal.
4. Because of other reasons that can be made known to this Honorable Court.

And as in duty bound, etc.

GEORGE R. GAITHER,
Counsel for the Plaintiff in Error,
Frank F. Graham.
CHARLES F. HARLEY,
Counsel for the Plaintiff in Error, The Title
Guaranty & Surety Company.
BURDETTE B. WEBSTER,
Trustee for Frank F. Graham, Bankrupt.
JOHN B. A. WHELTLE,
Counsel for Burdette B. Webster, Trustee for
Frank F. Graham, Bankrupt.

Order Staying Mandate.

Filed June 22, 1911.

In the United States Circuit Court of Appeals for the Fourth Circuit.

No. 1014.

FRANK F. GRAHAM and THE TITLE GUARANTY & SURETY COMPANY, Plaintiffs in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

Upon consideration of the petition filed herein, it is ordered that the mandate in the above entitled cause be stayed until the first day of November, 1911.

This 22nd day of June, 1911.

J. C. PRITCHARD,
U. S. Circuit Judge.

Petition for Writ of Error.

Filed July 22, 1911.

In the Supreme Court of the United States.

FRANK F. GRAHAM and THE TITLE GUARANTY AND SURETY COMPANY, Plaintiffs in Error,

versus

THE UNITED STATES OF AMERICA, Defendant in Error.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Frank F. Graham, The Title Guaranty & Surety Company, a body corporate, and Burdette B. Webster, trustee for Frank F. Graham, Bankrupt, and each of them, respectfully shows unto your Honors:

1. That the plaintiffs in error, and each of them, and they, and each of them, respectfully show that there was rendered and filed a judgment in the United States Circuit Court of Appeals for the Fourth Circuit, sitting in the City of Richmond, State of Virginia, in the cause there pending, in said Court, wherein the above entitled plaintiffs in error, and each of them, were there appellants and plaintiffs in error, and the defendant in error, The United States of America, was appellee and defendant in error, which cause was numbered in said Court ten hundred and fourteen (1014), on the nineteenth day of June, in the year nineteen hundred and eleven, affirming a judgment of the Circuit Court of the United States for the District of Maryland, in said cause; and that thereby, in the performance of said judgment manifest error has intervened to the great damage of your petitioners, and each of them.

2. That your petitioners, and each of them, further show that the matter in controversy in said suit exceeds the sum of one thousand dollars ($1000) and exceeds the sum of fifty thousand dollars ($50000), besides costs; and that this is a case which arose under and involves the construction of the Laws and Statutes of the United States; and it is not a case in which the decision of the Circuit Court of Appeals is made final; and that it is a proper case to be reviewed by the Supreme Court of the United States on writ of error.

3. That your petitioners, and each of them, show that this is not a case in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States, or citizens of different States; and that it is not a case arising under the Patent Laws, or under the Revenue Laws, or under the Criminal Laws, or in Admiralty; but that it is a case in which your petitioners, and each of them, are, as of right, entitled to an appeal, or writ of error, or review of the case by the Supreme Court of the United States; and that your petitioners, and each of them,

are suing out the writ of error within the time prescribed by law, and in all respects in a proper manner.

4. That your petitioners, and each of them, pray for the allowance of a writ of error, to the end that the cause may be carried to the Supreme Court of the United States; and that the transcript of the record and the proceedings on which said judgment is based, duly authenticated, may be sent to the Supreme Court of the United States, and for such other process as is required to perfect a writ of error herein prayed for, to the end that the errors herein may be corrected.

5. That they, and each of them, herewith file their assignment of errors.

GEORGE R. GAITHER,
Counsel for the Plaintiff in Error Frank F. Graham.
CHARLES F. HARLEY,
Counsel for the Plaintiff in Error The Title Guaranty & Surety Company.
JOHN B. A. WHELTLE,
Counsel for Burdette B. Webster, Trustee for Frank F. Graham, Bankrupt.

Assignment of Errors.

Filed July 22, 1911.

In the Supreme Court of the United States.

FRANK F. GRAHAM and THE TITLE GUARANTY & SURETY COMPANY, Plaintiffs in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

To the Honorable the Justices of the Supreme Court of the United States:

And now come Frank F. Graham, The Title Guaranty & Surety Company, a body corporate, and Burdette B. Webster, Trustee for Frank F. Graham, Bankrupt, plaintiffs in error, and each of them, and in connection with their application for a writ of error to the Supreme Court of the United States filed herewith from the final judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered therein on the nineteenth day of June, in the year nineteen hundred and eleven, and all orders in said cause affecting the substantial rights of the plaintiffs in error or any of them; and they and each of them file the following assignment of errors upon which they, and each of them, will rely in the prosecution of the writ of error in the above entitled cause:

1. That the Court erred in affirming the judgment of the Circuit Court of the United States for the District of Maryland in any particular and in every particular in which said judgment was affirmed, and in not reversing the same.

2. That the Court erred in affirming the judgment of the Circuit Court of the United States for the District of Maryland in sustaining the plaintiff's demurrer to the third plea of Frank F. Graham to the plaintiff's declaration.

3. That the Court erred in affirming the judgment of the Circuit Court of the United States for the District of Maryland in sustaining the plaintiff's demurrer to the third plea of The Title Guaranty & Surety Company to the plaintiff's declaration.

4. That the Court erred in affirming the judgment of the Circuit Court of the United States for the District of Maryland in sustaining the plaintiff's demurrer to the fourth plea of Frank F. Graham to the plaintiff's declaration.

5. That the Court erred in affirming the judgment of the Circuit Court of the United States for the District of Maryland in sustaining the plaintiff's demurrer to the fourth plea of The Title Guaranty & Surety Company to the plaintiff's declaration.

6. That the Court erred in affirming the judgment of the Circuit Court of the United States for the District of Maryland in sustaining the plaintiff's demurrer to the fourteenth plea of Frank F. Graham to the plaintiff's declaration.

7. That the Court erred in affirming the judgment of the Circuit Court of the United States for the District of Maryland in sustaining the plaintiff's demurrer to the fourteenth plea of The Title Guaranty & Surety Company to the plaintiff's declaration.

8. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's counsel propounded to witness Richard Rathbun:

"Now, will you just state how this approval was made and what the approval of the Smithsonian Institution means?"

Answer. The approval was made by the Secretary of the Smithsonian Institution, or by the Acting Secretary, who, by law, is given the same authority in his absence. The answer to the latter part of the question is simply this, that the Secretary of the Smithsonian Institution is actually or virtually the director of the Smithsonian Institution—I am not giving this as a matter of opinion, I would like to say, but as something which is contained in the documents of the Government. It is printed in statutes among the Acts of Congress, and I am not giving it as my opinion at all, but a reference to the documents will show the Secretary of the Institution——

9. That the Court erred in affirming the action of the Lower Court in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's counsel propounded to witness Richard Rathbun:

"You are referring to the documents of the Smithsonian Institution, aren't you?

Answer. "The Secretary is given entire authority to plan and conduct the operations of the Smithsonian Institution by resolution of the Board of Regents, which is repeated every year. It is only subsequently that the accounts are examined by the Board of Regents or the Executive Committee."

10. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Charles D. Walcott:

"Under what authority did you sign this letter of March 18, 1908, in which you approved the annulment of the contract?

Answer. "Under the authority—I don't recall the Acts by which the authority is granted—but it has been the general custom and practice—for the Secretary to approve of all contracts, agreements and matters relating thereto in connection not only with the construction of the present National Museum building, but also of other similar matters which may have come up from time to time."

11. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Charles D. Walcott:

"How old is this custom, if you know?"

Answer. "My personal recollection is that it dates back to 1856."

12. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Bernard R. Green:

"Mr. Green, in the Articles of Agreement it is stated that you made the agreement as Superintendent of Construction acting under the direction of the Regents of the Smithsonian Institution. Why was that put in there, and did you act under that direction?"

Answer. "It was put in there for propriety. I was in charge of the construction of the Museum under the law, but as the building was being erected for the purpose of the new National Museum, under the management, practically, of the Regents of the Smithsonian Institution—as the Museum has always been under their management and still is and was at the time—as a matter of courtesy, as the law itself did not specify particularly what my relations to the Institution would be, I naturally supplied the deficiency by assuming that the building should be constructed as the Regents of the Smithsonian Institution, who were in charge of the Museum, desired it to be. It was my desire to go on and contract — the National Museum without consulting the wishes of the Regents, as the law did not specify the details, and I wanted to build the building in conformance with their wishes as far as I could do it. I had no reason to feel and have none since that I should go in any way contrary to the wishes and desires of the Regents of the Smithsonian Institution in this matter. That was why that was put into the contracts and their approval obtained to all the contracts which really covered most of the proceedings towards the construction of the building."

13. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness, Bernard R. Green:

"Mr. Green, before writing those two last letters" (being letters from said witness dated March 18, 1908, to the defendants and purporting to annul the contract of October 23, 1906) "did you consult with the authorities of the Smithsonian Institution?"

Answer. "I do not remember specifically. I am quite sure I did,

because I was in consultation and discussion with the Secretary who represented the authorities, about the whole matter while it was in progress."

14. That the Court erred in affirming the action of the lower Court in refusing to grant the defendants' motion to strike out as voluntary and irresponsive that portion of said answer appearing in the thirteenth assignment of error immediately after the word "Secretary", and reading as follows: "Who represented the authorities, about the whole matter while it was in progress."

15. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows, that is to say, permitting the witness Bernard R. Green, to read to the jury the printed letter head of a letter dated April 11, 1908, from Philip Walker to Bernard R. Green, the said letter head being no part of the body of said letter: "Fidelity—Judicial. We issue surety bonds. Contract—Official. The Title Guaranty & Surety Company. Home Office: Scranton, Pa. Capital & Surplus over $1,000,000.00" (said figures being printed in red ink). "Philip Walker, Attorney, George T. Parker Company, General Agent, 201-227 Colorado Building. Phone Main 3491. Worthington, Heald & Frailey, Local Counsel, Washington, D. C."

16. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows, that is to say, permitting the witness Bernard R. Green to read to the jury the printed letter head of a certain letter dated April 15, 1908, under the following circumstances:

Question propounded to witness Bernard R. Green:

"Here is a letter dated April 15th, 1908, signed Philip Walker, addressed to you. If you received this letter, read the whole of it including the printed heading at the top of the letter both in black and red ink, as you did the prior letter.

"Answer. "As I said, I received this letter from Philip Walker, dated April 15, 1908. The sheet contains this: "Fidelity—Judicial. We issue surety bonds. Contract—Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and Surplus over $1,000,000.00" (said figures being printed in red ink) "Philip Walker, Attorney. George T. Parker Company, Gen'l Agt. 201-227 Colorado Building. Phone Main 3491. Worthington, Heald & Frailey, Local Counsel."

17. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows, that is to say, a letter dated April 15, 1908, from Philip Walker to Bernard R. Green:

"WASHINGTON, D. C., *April* 15, 1908.

Bernard R. Green, Esq., Superintendent of Construction, Library of Congress, City.

DEAR SIR: I have a letter from our attorney in Baltimore to-day, from which I quote the following for your information:

'In response to your favor of the 11th instant enclosing letter from Superintendent of Construction Bernard R. Green under date

of April the tenth and copy of your response thereto of April 11th, I beg leave to advise you that I have had a conference with Mr. Scherf this morning.

'I fail to see why Mr. Green should have to ask anybody for his property. The stone belongs to the Government; and Mr. Scherf has advised me that Mr. Graham will not contest the right of the Government to take its own property.

'However, as to the use of Mr. Graham's machinery, I have not been able to make any arrangements with Mr. Scherf. I had hoped to make an engagement by which you could see Graham himself today. Indeed, Mr. Scherf promised to arrange this, but later notified me that it would not do any good.

'The question now seems to be what arrangement can you make with Graham for the use of his machinery for the purpose of moving the stone.

'If no arrangement can be made, Superintendent Green will simply have to move this Government property without the aid of Graham's appliances.'

Yours very truly, PHILIP WALKER."

18. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows, that is to say, permitting the witness Bernard R. Green to read to the jury the printed letter head of a certain letter dated November 23, 1906, under the following circumstances:

Question propounded to witness Bernard R. Green:

"Mr. Green, I here show you a letter of November 23rd, 1906, addressed to you and signed George T. Parker, General Agent, and referring to an inclosure. Please look at this letter and if you received it, read to the jury, reading the same time the heading as before.

Answer. "I received from Mr. George T. Parker, General Agent, this letter dated 23rd of November, 1906. The sheet contains this: "Fidelity—Judicial. We issue Surety Bonds. Contract—Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and Surplus over $1,000,000.00," (said figures being printed in red ink) "Worthington, Heald & Frailey, Local Counsel. George T. Parker, General Agent, 201-227 Colorado Building. Phone: Main 3491. Philip Walker, Attorney."

"WASHINGTON, D. C., 23 *November*, 1906.

Bernard R. Green, Esq., Superintendent, Library of Congress, Washington, D. C.

DEAR SIR: Herewith I have the honor to hand you for file certified copy of Power of Attorney authorizing Geo. T. Parker, Philip Walker, Willis W. Parker and William R. Parker, or any two of them, to execute bonds for this Company.

Kindly acknowledge receipt of the same, and oblige,

Yours respectfully, GEORGE T. PARKER,
General Agent."

Inclosure, J. M.

19. That the Court erred in affirming the action of the lower Court in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you ever communicate to the Regents of the Smithsonian Institution the changes made by you in setting plan No. 20?"

20. That the Court erred in affirming the action of the lower Court in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"I want to ask you whether you have communicated to the Regents of the Smithsonian Institution the long delays that were occasioned by you and your office in approving the setting plans submitted by Mr. Graham?"

21. That the Court erred in affirming the action of the lower Court in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution the fact that you had made numerous and material changes in the plans for this building?"

22. That the Court erred in affirming the action of the lower Court in refusing to allow counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution the fact that you were responsible for delay in approving these plans?"

23. That the Court erred in affirming the action of the lower Court in refusing to allow counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution at any time the fact that the Government had not delivered to Mr. Graham with promptness the granite F. O. B. in net dimensions at the quarry in Bethel, Vermont?"

24. That the Court erred in affirming the action of the lower Court in refusing to allow counsel for the defendants to ask witness Bernard R. Green on cross-examination the following question:

"You have nothing here to show, then, how many cubic feet of stone you cut on the Graham job?"

25. That the Court erred in affirming the action of the lower Court in saying to counsel for defendants in the presence of the jury immediately after the propounding of the question mentioned in the twenty-fourth assignment of error."

"You can not expect a man in charge of a big job like this to carry all those figures in his mind."

26. That the Court erred in affirming the action of the lower Court in using in the presence of the jury the following language:

"The contract says that the payments shall be made from time to time as the progress of the work may warrant. Surely the man who has to make the payments is the man to judge how much is warranted."

27. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Bernard R. Green on re-direct examination:

"On page 424 of the record, your cross-examination, and on page 425, questions were asked you in reference to your absence from Washington; could or could not the work under the Graham contract be continued during your absence from Washington by your office force in Washington?

Answer. "It could be continued, and it was continued perfectly well."

28. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Bernard R. Green on re-direct examination:

"Doesn't a comparison of the blue print marked 'Superseded' and bearing upon it the endorsement 'Approved October 21, 1907,' and the tracing marked 'Approved January 29, 1908,' show that in the preparation of the first setting plan an error had been made by Mr. Graham or his draftsman in the quantity of stone shown upon the courses?"

Answer. "It shows that this is a new tracing. The original tracing evidently from which this blue print was made, bears my approval marked 'October 21, 1907.' The similar approval marked and placed upon the new tracing in a similar spot shows that there was no previous signature or approval marked on that. That is perfect evidence to my mind that this is a new tracing made from the original one and that the stones are corrected upon it."

29. That the Court erred in affirming the action of the lower Court in using in the presence of the jury the following language:

"This is as slow as cutting granite."

30. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Albert L. Harris:

"What is the usual form for furnishing setting plans that you have come across in your experience of twenty-one years in architecture?

Answer. "The usual form is the form as stated in Mr. Green's letter."

31. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness, William Pirie:

"Now, will you state whether or not the material shown in all these vouchers was received at the building, if you know, personally?"

Answer. "I will state to the jury that I spent Saturday reading them over and there was no voucher for material that we did not receive."

32. That the Court erred in affirming the action of the lower Court in addressing to counsel for the defendants in the presence of the jury the following language:

"I can not see why you emphasize that of being of such supreme importance."

33. That the Court erred in affirming the action of the lower Court in addressing counsel for the defendants in the presence of the jury the following language:

"I think you are rather violent with the witness, and I can not see that it is of such supreme importance."

34. That the Court erred in affirming the action of the lower Court in admitting in evidence on behalf of the plaintiff in the testimony of the witness Frederick R. Freas, the "gate rolls."

35. That the Court erred in affirming the action of the lower Court in admitting in evidence on behalf of the plaintiff in the testimony of the witness Frederick R. Freas, the "time books, just the small Library books."

36. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness, Frederick R. Freas:

"Now, of all those vouchers which you looked over, can you state whether or not there was anything included in those vouchers, any item which was not received on the contract No. 25?"

Answer. "I believe there are no vouchers in there—when I saw them the other evening there was some made out at the Library office, but we received the goods."

37. That the Court erred in affirming the action of the lower Court in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Vernon H. Hagan:

"Can you state whether or not the time and the names of the men as shown on those pay rolls are correct, as compared with the gate roll and time books?"

Answer. "They are correct."

38. That the Court erred in affirming the action of the lower Court in refusing to admit evidence on behalf of the defendants as follows:

The original contract dated October 17, 1904, and the specifications annexed thereto as a part thereof, between Bernard R. Green, Superintendent of Construction, and the Thompson-Starrett Company, the full substance of said rejected evidence being as follows:

BUILDING FOR THE NATIONAL MUSEUM.

WASHINGTON, D. C., *Sept.* 1, 1904.

Specifications for Cut Granite for Exterior and Court Walls Exclusive of South Pavilion.

Description and Conditions.

The cut granite called for in the foregoing advertisement and described in these specifications, comprises all the stones necessary for the construction of the facades of all the exterior walls of the building (exclusive of the South Pavilion) and all the stones re-

quired for the walls of the two courts, as further described belo and as represented in the twenty-five (25) sheets of drawings No 14 to 38, both inclusive, prepared by Hornblower and Marshal Architects, Washington, D. C.

2. The several drawings are as follows:

No. 14, Block Plan.
Nos. 15, 16, 17, Basement Plan.
Nos. 18, 19, 20, First Floor Plan.
Nos. 21, 22, 23, Second Floor Plan.
Nos. 24, 25, 26, Third Floor Plan.
Nos. 27, 28, 29, 30, Exterior Elevations, East and West Court Elevations.
Nos. 31, 32, Court Elevations.
Nos. 33, 34, 35, 36, 37, 38, one-half inch scale details.

3. The exterior wall fronts are to be wholly of granite.

4. The Court walls will be mainly of brick trimmed with the granite herein called for and as shown in the drawings.

5. Figures on the drawings are to be taken wherever they occur in preference to scale dimensions.

All explanations and notes on the drawings are to be considered a part of the drawings and used as such.

6. Any discrepancies or obscurities discovered in the drawings or specifications or both must be immediately brought to the notice of the Superintendent of Construction for explanation before proceeding with any work affected by them.

7. The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at not less than one quarter inch to the foot scale (¼″=1′), prepared as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of work on the cutting of the stones they represent, to give ample time for examination and approval. The setting plans for the lower courses of the Basement Story,—the first courses to be cut,—must be prepared and submitted immediately after execution of the contract.

8. In laying out these drawings the courses of stone are to be lettered, as shown in the original drawings, in two series of letters, namely: Beginning at the first course above the water table, A, B, C, upward to the end of the alphabet, the remaining courses at the top of the wall to be Az, Bz.

Beginning at the water table, the basement story will be double-lettered downward, AA, BB, CC, to the bottom course HH.

In the courts a separate series of letters will be used from the ground to the cornice. The several stones of each course will be numbered serially from the east side of the south pavilion entirely around the building to the west side of same for the front walls, and a similar but separate number series will be used around the east court and continued into and around the west court. Thus no two stones in the building will have the same mark.

9. Blue or white prints of these drawings, mounted on muslin

not exceeding twelve of each sheet, shall be furnished at his own cost by the contractor to the Superintendent of Construction promptly as may be called for from time to time for the use of his office and operations on the building.

10. Each and every cut stone shall be marked by the contractor, before shipment from the cutting yards, plainly with indelible black paint, both on an end joint of the stone and the outside of the boxing, with its proper course letter and number.

11. As soon as each stone is finished and accepted by the government inspector at the cutting yards it must be carefully and substantially boxed with stout lumber that will not stain the stone and strapped and secured with galvanized iron, and galvanized nails. This boxing shall be at least as good as the inspector may approve of, but the contractor will remain responsible for the safe delivery of the stone on the site of the Museum building.

12. The preparation and delivery of the stone must proceed as nearly as may be directed by the Superintendent of Construction in the natural order of building.

13. The drays delivering stone at the site of the building shall haul the loads to points designated by the Master Mechanic. They will there be unloaded and the stones piled by the United States.

14. The contractor shall provide all necessary patterns, gauges, templets, squares, edges, tools, implements, machinery, buildings, materials, labor, etc., and transportation for the most prompt, expeditious and complete performance of all work involved in furnishing, preparing and delivering at the site of the building all of the cut and rough granite called for in his contract.

15. Full size profiles will be supplied to the contractor by which he shall accurately make the necessary templets and patterns.

16. The Act of Congress, approved March 3, 1903, authorizing the construction of the Building provides that "a contract or contracts for its completion is hereby authorized to be entered into subject to appropriations to be made by Congress." The contracts for the cut granite entered into under these specifications, and the continuity of the work will therefore be subject to the appropriations that Congress may make from year to year, as is done with many other government contracts.

17. The quantity of cut granite to be furnished each fiscal year will be regulated as nearly as practicable by the Superintendent of Construction to correspond to the respective annual appropriation in justice to other parts of the work and other contractors, should any such appropriation happen to be inadequate to the full practicable progress of the year's work, otherwise the contractors shall make the progress hereinafter stipulated to be made for prompt completion.

18. The contractor shall if required by the Superintendent of Construction, cause a valid and binding lease or leases of the quarry or quarries from which the stone is to be taken to be executed by the owner or owners of the quarries to the United States, to take effect upon the failure of the contractor to supply all the stone required by his contract to be taken from said quarry or quarries,

said lease or leases to authorize the United States to take full possession of the said quarry or quarries and the entire equipments for working the same and to work the same at the expense of the contractor or contractors, in case of default. The validity of the ownership or control of quarries must be established by bidders if called upon for it.

19. Bidders are required to return all drawings with their proposals and, if not to submit proposals, to return them immediately.

Granite.

20. All the granite must be of a permanently bright color, evenly mixed ingredients and compact texture, tough and thoroughly suitable for fine cutting and moulding and sharp arrises.

It must be uniformly free from coarse specks, blotches, or streaks of any kind or color which may affect to the eye the continuity of cut lines, mouldings or surfaces. Every stone must be sound and free from flaws, seams, shakes, stains, discolored knots or streaks, or impurities that may cause future stain or discoloration.

21. Because of the magnitude of the building, granite from several different quarries may be used to expedite the work of construction, but this will be determined upon as the kinds, shades and textures of the several granites and the respective bids for the same may appear on the opening. It is to be understood, however, that the awards of contracts will be primarily dependent upon the suitability of the different granites and the matching up of the same in the judgment of the Architects and the Superintendent of Construction in order to satisfactorily secure the following result, namely:

22. A coarse grained granite of somewhat darker color for the Basement Story (courses HH to AA inclusive); a lighter and finer grained granite for the First and Second Stories from the top of the water table to and including the main cornice and pediments (courses A to U inclusive) and for the court walls; and a still lighter and finer grained granite for the Attic (courses V to Bz inclusive, to the top of the walls and dormer windows).

23. In selecting the granites and prices it is possible that three different quarries may be drawn upon for the Basement walls divided as follows:

1. From A eastward around to the angle at B.
2. From angle B northward, along the whole north front and the west side of building to C.
3. From angle at C southward and eastward along the south front to angle at D.

(See the block plan No. 14.)

The first and second stories, comprised in courses A to U inclusive and including the main cornice and pediments complete will all be of one granite practically from the same quarry.

The attic or third story, comprised in courses V to Bz inclusive

and including the dormers will also all be of one granite and practically from one quarry.

The granite of the court walls will all be from one quarry.

24. The proposals must therefore be in separate amounts for each of the separate sections of the building above described and as set forth in the blank form of proposal herewith. It is understood that any one or more of these proposals may be accepted independently and regardless of the others.

25. Each proposal must be accompanied by a sample block of the granite proposed to be furnished. The sample to be 2 feet x 1 foot x about 4 inches thick, and dressed 6-cut work on one flat face, jointed at edges and rough on the other face. The name of the bidder must be cut in the dressed face.

26. The proposal must state the location and name of the quarry from which the sample is taken and the locations of important buildings built of the stone not less than eight years ago.

27. As the granite for the pavilion and dome at the south front of the Building is not included in the proposal and contract herein provided for and as it will have to be procured later to match the granite adopted for the First and Second stories, the contractor for the last mentioned granite must agree to furnish to the United States "F. O. B." at the quarry at any time within two years after the expiration of his contract, all the granite needed from said quarry for the construction of the said pavilion and dome after the general design of the said pavilion shown in the drawing or any architectural modification thereof, at a price per cubic foot (quarry dimensions) to be stated in the proposal. The said quarry dimensions of the several rough blocks for the stones to compose the said pavilion and dome shall be the three net cubic dimensions of the dressed stone.

Cutting.

28. All stock must be essentially full to the lines and dimensions on the drawings. The several stones must also be such as will bond well with the brick backing of the walls.

29. The finished dimensions, gauges, etc., of all stones must be to the United States standard measure.

30. The grades of cutting for the several parts of the walls will be as follows, excepting as otherwise particularly specified, namely:

For the Basement Story and Attic, as above defined, and the Court walls, good four-cut work, and for the First and Second Stories including the main cornice and pediments all as above defined, good six-cut work. The face of the bossage (or raised faces of the ashlar fronts) in the Basement, above the window sills and below the water table course, will be in coarse picked work.

31. The quality and character of the several grades of cutting and of the picked work above named that will be uniformly required of the contractor is distinctly represented in four large dressed samples of granite prepared by the United States expressly for this purpose and to be seen at the site of the Building on the Mall, B street

at 10th street, N. W., Washington, D. C. Bidders should carefully inspect these samples before making up their proposals.

32. Machine dressing of the stone shall be re-dressed by hand if deemed necessary by the Superintendent of Construction to produce the desired hand-cut quality of work.

33. All bush hammer cuts must be parallel and squarely across the faces of the stones as will be directed. All cutting of arrises and of all projecting mouldings, fillets, etc., shall be carefully done to avoid "stunning." All bushing and pointing must be done with sharp tools.

34. Hidden and rear faces of the work, top angles of mouldings or other projections cut on to stones, and other parts of the work unseen from the fronts of the building or from any of the windows, etc., may be left more or less roughly finished as may be specially directed, but the stock must be full to avoid holes or lumps to collect dust and water.

35. All sills, projecting courses, platforms, copings, etc., will be cut with proper seats and washes for jambs, architraves, etc.

All moulded work will be accurately profiled, cut to the dimensions and jointed as shown on the drawings and by such details and models as will be furnished to the contractor by the Superintendent of Construction.

The curved pediments will be cut from the solid and finished to the proper radius.

The entasis of the columns must be carefully cut according to the detail drawings and especially to secure exact fitting and alignment of the several drums.

The inside returns of the window jambs will be finely cut as directed at least 4 inches back from face of reveal to allow for window finish.

The inside faces of all high window sills must be dressed off where necessary to clear inside furring or finish, and all thin sills must be fine joint cut at the back.

36. No patching or mending of stones in any way whatever will be allowed excepting in rare and unimportant cases, and then only by special consent of the Superintendent of Construction in each separate case.

37. In making up the estimate bidders will disregard the rough blocks marked "carved" in the Attic story including the two pieces on top of each of the pediments but excluding the pieces within the pediments, as noted in writing on the drawings. In place of these rough blocks bidders will include in their estimates the substitution of plain dressed ashlar work.

Jointing.

38. All joints, beds and builds must be full and fine joint cut and free from large plug holes, the axe to be freely used. They must be carefully worked from true and full margin drafts. All dimensions of stones given in the drawings and schedules are the full net dimensions without allowance for thickness of joints. The

contractors will therefore allow for joints as follows: For all bed joints one quarter of an inch (¼″) and for all end or vertical joints three sixteenths of an inch (3/16″). Particular care must be exercised in the cutting that all the joints shall be exact and uniform. All joints must be fine cut and full within three inches (3″) of the faces of the stones and axed full for at least three quarters of the bed and one-half of the build and end joints, the fullness properly distributed and no deep or wide plug holes or cavities.

39. False jointing deeply and carefully cut for pointing with mortar may be done in certain cases where deemed proper and allowed by the Superintendent of Construction.

40. Every stone must be out of wind, die square, of full pattern throughout, and exactly to the dimensions and shape called for by the drawings.

41. Dove-tail lewis holes of proper depth must be accurately cut in the top bed of every stone and so located that the stone will hang level and plumb.

Carving.

42. No carving is to be included in the contract, but the contractor will, as a rule, furnish all blocks required for the carving as indicated in the drawings or to be directed by the Superintendent of Construction, properly jointed to fit into place and with rough stock enough projecting and full jointed to permit the carving to be properly done by the United States.

Time.

43. The cut granite of the respective sections or parts of the walls above separately designated shall all be furnished and delivered within the following times after the date of notification of the approval of the contract, namely:

1. Courses HH and GG of Basement front walls complete within four months.
2. Remainder of Basement story front within nine months.
3. Courses A to H of First story front complete within eight months.
4. Remainder of First and Second stories front complete within one and a half years.
5. The Attic or Third story complete within one and a half years.
6. Course A of Court walls complete within four months.
7. Courses B and C of Court walls complete within nine months.
8. Remainder of Court walls complete within one year.

The several courses of stone must be promptly completed and delivered for the natural order of building so that construction may proceed regularly in proper order. Payment for stones delivered much out of proper order, as may be decided by the Superintendent of Construction, will be reserved.

Payments in general will be regulated by the promptness, system and good progress made by the respective contractors in fulfilling the time schedule above laid down.

Read the General Instructions and Conditions, herewith.

Articles of Agreement.

This agreement, entered into this Seventeenth day of October nineteen hundred four, between Bernard R. Green, Superintendent o Construction, of the first part, acting under the direction of th Regents of the Smithsonian Institution, for and in behalf of th United States of America, and Thompson-Starrett Company, (a cor poration existing under the laws of the) State of New York, of the second part,

Witnesseth, that, in conformity with the advertisement, specifica tions, instructions, and general conditions hereunto attached, which form a part of this contract, the said Bernard R. Green and the said Thompson-Starrett Company, do covenant and agree, to and with each other, as follows:

The party of the second part shall furnish and deliver at the site of the Building for the National Museum on the north side of the Mall opposite Tenth street, Washington, District of Columbia, from the quarries of the E. B. Ellis Granite Company at Bethel, County of Windsor, State of Vermont, and in strict accordance with the sample of granite from said quarries submitted by the said party of the second part with their competitive proposal for this contract, all of the cut granite required for the front walls of the first and second stories, being courses A to U, both inclusive and including the main cornice and pediments complete, of the first and second stories of said building, and do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions, all for the gross sum of Three hundred and sixty-two thousand four hundred and forty-eight and 63/100 dollars ($362,448.63).

It is further agreed by the parties hereto that the party of the second part shall, within two years from date of the completion of this contract, if required by the party of the first part, furnish for the said building, "free on board" cars at the said quarries, all of the granite of the same kind and quality as hereinbefore specified and in proper dimension blocks, required for the construction of the central pavilion and done at the south front of the building as shown in the said drawings or any architectural modification thereof, for the price of eighty-two and one-half cents ($0.82½) per cubic foot.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the Superintendent of Construction as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 42 of the attached general conditions.

4. If, in any event, the party of the second part shall delay or

fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Superintendent of Construction, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Regents of the Smithsonian Institution, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, that the party of the first part may, with the prior sanction of the Regents of the Smithsonian Institution, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission

of charges shall in no other manner affect the rights or obligatio of the parties under this contract.

6. If, at any time during the prosecution of the work, it be fou advantageous or necessary to make any change or modification the project, and this change or modification should involve su change in the specifications as to character and quantity, wheth labor or material, as would either increase or diminish the cost the work, then such change or modification must be agreed upon writing by the contracting parties, the agreement setting forth full the reasons for such change, and giving clearly the quantities an prices of both material and labor thus substituted for those name in the original contract, and before taking effect must be approve by the Regents of the Smithsonian Institution: Provided, that n payments shall be made unless such supplemental or modifie agreement was signed and approved before the obligation arisin from such modification was incurred.

7. No claim whatever shall at any time be made upon the Unite States by the party or parties of the second part for or on account o any extra work or material performed or furnished, or alleged t have been performed or furnished under or by virtue of this con tract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been ex pressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Regents of the Smithsonian Institution.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the ma terial and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this con tract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 41 of the general conditions hereto at tached and forming part of this agreement.

12. Neither this contract or any interest therein shall be trans ferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said Thompson-Starrett Company are reserved to the United States.

13. No Member of or Delegate to Congress is or shall be ad-

mitted to any share or part of this contract, or to any benefit which may arise therefrom. But this stipulation is not to be construed to extend to this contract.

14. This Contract shall be subject to approval of the Regents of the Smithsonian Institution.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

JOHN Q. SHEEHY, As to

BERNARD R. GREEN, [SEAL.]
Superintendent of Construction.

THOMPSON-STARRETT CO.,
By THEODORE STARRETT, *President.*

Attest:

[L. S.] L. J. MORTON, *Treasurer.*

(Executed in triplicate.)

Approved February 7, 1905, for the Regents of the Smithsonian Institution,

By S. P. LANGLEY, *Secretary.*

39. That the Court erred in affirming the action of the lower Court in refusing to admit and in striking out evidence on behalf of the defendants as follows:

Q. Now, will you state whether or not Mr. Bernard R. Green did not in writing extend the time of the completion of the original contract with the Thompson-Starrett Company until June 30, 1907?

A. He extended the completion of the cut stone part of the contract, not the rough stone.

Q. Until June 30, 1907?

A. That was cut stone under the Thompson-Starrett contract.

The aforegoing having been objected to by the District Attorney and stricken out by the Court on said objection.

40. That the Court erred in affirming the action of the lower Court in refusing to admit evidence on behalf of the defendants as follows:

The lease dated October 31, 1904, between the Thompson-Starrett Company and Bernard R. Green, Superintendent of Construction, of the quarry at or near Bethel, Vermont, the full substance of said rejected evidence being as follows:

This indenture, made the 31st day of October, in the year of our Lord one thousand nine hundred and four, between the Thompson-Starrett Company, a corporation organized under the laws of the State of New York, County of New York, party of the first part, and Bernard R. Green, Superintendent of Construction of the building for the National Museum, for and on behalf of the United States of America, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the covenants and agreements contained in certain articles of agreement by and between the parties hereto, bearing date of October

17th, 1904, for furnishing and delivering from the quarries at Bethel, County of Windsor, State of Vermont, of all the granite required for the front walls of the first and second stories of the building for the National Museum in Washington, District of Columbia, to be kept and performed by the party of the first part hereto, hath demised and leased and by these presents doth demise and lease to the party of the second part all those premises, together with the appurtenances thereto belonging, situate in the Town of Bethel, in the County of Windsor, State of Vermont, known and described as follows, to wit:

A certain tract of land in said Bethel, bounded as follows:

Beginning at a beech tree at the intersection of the boundary line of the premises hereby conveyed and the Chatfield farm on the east, and the southerly line of the premises hereby conveyed and the land of H. W. Davis on the south and running thence north 47° east 249½ rods, along the westerly line of the Chatfield farm and the Benedict farm; thence north 42° west 32 rods to a gate; thence along said gate to the end thereof; thence north along a stone wall 65½° west 44 rods; thence still north along said stone wall 68° west 120 rods to the end of said stone way, which stone wall separates the premises hereby conveyed from premises of Charles Waterman and land formerly owned by F. A. Stevens; thence south 71½° west 128 rods, along another stone wall; thence south 89° west 22 rods and 7 links; thence due north 11 rods 13 links to an apple tree with iron pin at base; thence north 54° west 12 rods to an iron pin and stones; thence north 77° 10′ west 26 rods 23 links to a yellow birch tree with an iron pin in the same; thence south 11° 35′ west 42 rods 6 links to an iron pin; thence north 55° 45′ west 32 rods 21 links to an iron pin and stone; thence south along the easterly line of lands now or formerly owned by E. F. Felton to an iron pin; thence south 36° east 31 rods 7 links to an iron pin; thence south 51½° west 8 rods 10 links to an iron pin; thence south 33½° west 18 rods 19 links to the westerly end of a stone wall separating the premises hereby leased from lands now or formerly owned by H. W. Davis; thence along said stone wall south 66° 45′ east 114½ rods to the point or place of beginning; the above premises being known as the L. N. Abbott farm, the Eight Acre Lot and the Bagley Lot, and being the same premises conveyed to the E. B. Ellis Granite Company by deeds from Edwin B. Ellis and Goldwin Starrett, dated December 21, 1903, recorded in Office of the Clerk of the Town of Bethel, December 22, 1903, in Book 28, page 408; also deed same to same, dated December 21, 1903, recorded December 22, 1903, Book 28, 408.

Also the right of way to pass to and from the premises and the granite ledges thereon for the purpose of working and quarrying said ledges and transferring the products of said premises and said ledges from all parts of said premises and said ledges over the road as now traveled from the opening of the ledges to the road leading from the village of Bethel to said premises.

Meaning hereby to convey the parcels of land described in deeds executed by Edwin B. Ellis and Goldwin Starrett to E. B. Ellis

Granite Company on the 21st day of December, 1903, recorded in the Office of the Clerk of the Town of Bethel, Windsor County, Vermont, in Registry of Deeds, Book 28, page 408, and also, during the purposes of the lease, the use of the shafts, sheds, appurtenances and lands required for procuring, preparing and shipping all of the aforesaid granite required for the first and second story front walls of the building for the National Museum.

To have and to hold the above mentioned and described premises, with the appurtenances, unto the said party of the second part, for the period of one and one half years from and after the 17th day of October, in the year of our Lord one thousand nine hundred and four, and for and during such further time as may be necessary to procure from the said premises delivery of all the aforesaid granite required for and to be delivered at the building for the National Museum, the full right, authority and power to enter upon or occupy and use the same or procure therefrom any and all such granite as the said party of the first part shall fail, omit or decline to furnish for the said building for the National Museum under the aforesaid articles of agreement between parties hereto.

It is expressly understood and agreed that, if the said party of the first part shall perform all and singular the covenants, stipulations and agreements contained in the aforesaid articles of agreement between the parties hereto, this lease shall be void and of no effect, but that, if the said party of the first part shall be in default in the performance of said articles of agreement then this lease shall be of full effect and virtue.

And it is expressly understood and agreed that the aforesaid entry or occupancy of the said premises shall not be made unless the said party of the first part shall be in default in the aforesaid articles of agreement and unless the party of the second part shall give to the party of the first part eight (8) days' notice in writing of his intention to do so, and in case of said default or failure to comply with the conditions of said articles of agreement at the end of said eight (8) days, the party of the second part shall enter into full and complete possession of said premises with the appurtenances aforesaid, until the purpose of this lease, as herein declared, shall have been accomplished.

And the party of the second part further covenants with the party of the first part, that, at the expiration of the time in this lease mentioned, he will yield up said demised premises to the party of the first part.

In testimony whereof the said parties hereto have hereunto, and to a triplicate hereof, set their hands and seals the day and year first above written, the party of the first part acting herein by Theodore Starrett, its President, hereto duly authorized.

THOMPSON-STARRETT CO.
THEODORE STARRETT, *President.*
BERNARD R. GREEN, [SEAL.]
Superintendent of Construction of Building for National Museum.

[L. S.] L. J. MORTON, *Treasurer.*

Signed, sealed and delivered in the presence of:
CHARLES M. BEECKER,
As to Theodore Starrett.
JOHN Q. SHEEHY,
As to Bernard R. Green.

STATE OF NEW YORK,
County of New York, ss:

On the third day of November, in the year of our Lord one thousand nine hundred and four, before me personally came Theodore Starrett, to me known, who, being duly sworn, did depose and say that he resided in the Borough of Manhattan, City of New York, State of New York; that he is the president of the Thompson-Starrett Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

CHARLES M. BEECKER,
[L. S.] *Notary Public, N. Y. Co.*

41. That the Court erred in affirming the action of the lower Court in refusing to admit evidence on behalf of the defendants as follows:

The book of original entry showing dimensions of all stones received by the defendant Graham from the plaintiff.

42. That the Court erred in affirming the action of the lower Court in refusing to permit the defendant Frank F. Graham to answer under direct examination the following question:

"What was it your intention to do about this Government work?"

43. That the Court erred in affirming the action of the lower Court in granting the following prayers and each of them offered by the plaintiff (including the plaintiff's nineteenth prayer as amended by the Court):

Plaintiff's 2 Prayer.

The Court instructs the jury that there is no evidence sufficient in law to sustain the first plea of either of the defendants.

Plaintiff's 3 Prayer.

The Court instructs the jury that there is no evidence sufficient in law to sustain the second plea of either of the defendants.

Plaintiff's 4 Prayer.

The Court instructs the jury that there is no evidence sufficient in law to sustain the fifth plea of either of the defendants.

Plaintiff's 5 Prayer.

The Court instructs the jury that there is no evidence sufficient in law to sustain the sixth plea of either of the defendants.

Plaintiff's 8 Prayer.

The Court instructs the jury that there is no evidence sufficient in law to sustain the ninth plea of either of the defendants.

Plaintiff's 9 Prayer.

The Court instructs the jury that there is no evidence sufficient in law to sustain the tenth plea of either of the defendants.

Plaintiff's 10 Prayer.

The Court instructs the jury that there is no evidence sufficient in law to sustain the eleventh plea of either of the defendants.

Plaintiff's 13 Prayer.

The Court instructs the jury that there is no evidence sufficient in law to sustain the fifteenth plea of the defendant, The Title Guaranty & Surety Company.

Plaintiff's 19 Prayer (as Amended by the Court).

The plaintiff, the United States of America, prays the Court to instruct the jury that if they find for the plaintiff, the United States of America, in this case, they are to allow as damages the difference between what they may find to have been the reasonable and necessary cost to the plaintiff, the United States of America, for transporting, cutting and delivering the gran*tie* mentioned in this case at the south pavilion of the National Museum building in Washington, District of Columbia, and the amount specified in the contract offered in evidence in this case to be paid by the United States to the defendant, Frank F. Graham, for so transporting, cutting and delivering the said granite, the sum allowed, however, not to exceed the penalty of the bond sued on in this case, namely, fifty thousand dollars, with interest, in the discretion of the jury, from May 25, 1909.

44. That the Court erred in affirming the action of the lower Court in its refusal to grant the following prayers and each of them, offered by the defendants:

Defendants' Prayer No. 1.

The jury are instructed that in this case the United States occupies the same position as though it were a private individual; and that it is not favored in the law applicable to this case over any such private individual.

Defendants' Prayer No. 2.

The jury are instructed that they are the exclusive judges under the evidence in this case as to what is meant in the contract of October 23, 1906, offered in evidence, by "net dimension blocks."

Defendants' Prayer No. 3.

The jury are the exclusive judges as to what is meant by the words "net dimension blocks" in the specifications constituting a part of the contract of October 23, 1906; and if the jury find from the evidence in this case that large quantities of the granite mentioned in said contract were furnished to said Graham in shapes and sizes which were not "net dimension blocks," and that said shape and sizes were materially more expensive to said Graham to freight and cut; and that said Graham on or about the eighteenth day of December, 1907, made a demand upon the Superintendent of Construction for an allowance for such additional freight and cutting on sixty-five car loads of such granite, and that said Superintendent of Construction refused to make any allowance for such additional freight and cutting; and that thereafter about one hundred further car loads of granite were furnished to said Graham; and that such car loads arrived from time to time up to March 7, 1908, or thereabouts, and that large quantities of such granite so furnished continued up to said time to be in shapes and sizes which were materially more expensive to said Graham to freight and cut; and that thereupon the said Graham on or about the said seventh day of March, 1908, ceased to cut the granite so furnished; then, the jury are instructed that the said Graham was justified in so stopping said work; and that under the pleadings in this case, the verdict of the jury must be for the defendants as to the claim of the United States.

Defendants' Prayer No. 4.

If the jury find from the evidence that the defendant Graham at his own expense prepared full and complete sets of setting plans of the stone work referred to in the contract dated October 23, 1906, offered in evidence, showing fully every separate stone in the work, and that said plans were traced at one quarter inch to the foot scale and were prepared, lettered, and numbered as directed by the Superintendent of Construction and that said plans so prepared were delayed in submission to the said Superintendent of Construction by the acts or delays of said Superintendent of Construction or his agents, and not by the acts or defaults of said Graham, and that the granite mentioned in said contract was not furnished to said Graham in net dimension blocks without unnecessary delay free on board cars at the quarry at Bethel, Vermont, and that said failure on the part of said Superintendent of Construction so to furnish said granite in net dimension blocks without unnecessary delay free on board cars at said quarry resulted in large expenses and losses to said Graham, and that payments were not made to said Graham from time to time as the progress of the work warranted less a percentage of ten per centum reserved from each payment; and that in the winter of 1907 and 1908, after October 1, 1907, the United States delivered and continued to deliver to the defendant Graham quantities of granite, and that said granite was not in net dimension blocks and was in excess of such amount as said Graham could reasonably be expected to cut at that season of the year; and that thereupon in the month

f March, 1908, said Graham ceased to cut the granite referred to n said contract; then, their verdict should be for the defendants; nd the jury are further instructed in this connection that they are he exclusive judges under the evidence in this case as to what is neant in the contract of October 23, 1906, and the specifications onstituting a part thereof, by "net dimension blocks."

Defendants' Prayer No. 5.

If the jury find from the evidence that the granite mentioned in ne contract of October the twenty-third, 1906, offered in evidence, as not furnished to the defendant Graham without unnecessary elay, and that less than eleven thousand cubic feet thereof were rnished to said Graham before October 1, 1907; and that said Gra- am had lost large sums in waiting for granite to be furnished prior October 1, 1907; and that between the said first day of October, 907, and the seventh day of March, 1908, a granite supply was fur- ished largely in excess of the amount which said Graham could asonably have been expected to handle and cut at that season; and at the excess of the supply received over the amount which said raham could reasonably have been expected to cut at said season ecame and was massed in said Graham's yards at Baltimore in such nounts as to make impracticable to work profitably in said yards; d that said Graham thereupon ceased to work upon said granite; en, the jury are instructed that said Graham was justified in so ing; and that under the pleadings in this case, the verdict of the ry must be for the defendants.

Defendants' Prayer No. 6.

That according to the true construction of the contract of October , 1906, and the specifications constituting a part thereof, the de- ndant Graham was obliged to furnish setting plans, prepared, let- ed and numbered as may be directed by the Superintendent of nstruction, and said Graham was obliged to submit such setting ans to said Superintendent of Construction not less than one month ior to the commencement by said Graham of the work on the cut- g of the stones represented in such setting plans; and the said ntract and specifications do not provide for the furnishing of set- g plans or copies thereof to the Quarry at or near Bethel, Vermont.

Defendants' Prayer No. 7.

That the receipts given by the defendant Graham from time to ne for amounts received from the Superintendent of Construction progress payments are not conclusive evidence of the respective ounts due at the time of such payments; and the jury are to dge from all the evidence whether such payments were all that the ogress of the work fairly and reasonably warranted at the time such payments.

Defendants' Prayer No. 8.

The general instructions and conditions, constituting a part of the contract of October 23, 1906, offered in evidence, provide:

"Payments will be made from time to time as the progress of the work may warrant. A percentage of ten per centum will be reserved from each payment until the whole of the cut granite called for by the annexed contract shall have been satisfactorily delivered and accepted;" and the jury are instructed that under this provision, the defendant Graham was entitled to ninety per cent of such payments from time to time as the progress of the work fairly and reasonably warranted; and the jury are the exclusive judges under all the evidence in this case as to what payments the progress of the work from time to time did fairly and reasonably warrant.

Defendants' Prayer No. 9.

In no event can the United States charge against the contract of October 23, 1906, more than the fair and reasonable value of completing the work mentioned in said contract; and the jury are the exclusive judges as to what is fair and reasonable under the evidence in this case; and if the jury find from the evidence that the fair and reasonable value of the completion of the work mentioned in said contract, should not have exceeded the contract price of one hundred and forty-nine thousand dollars ($149,000) less the sum of fifty-nine thousand four hundred dollars ($59,400) paid to said Graham; then, the verdict of the jury must be for the defendants.

Defendants' Prayer No. 10.

No evidence has been offered legally sufficient to prove the fair and reasonable cost of completing the work mentioned in the contract of October 23, 1906, offered in evidence, in excess of the price in said contract stipulated to be paid to the defendant Graham for the completion of said contract; and the verdict of the jury must, therefore, be for the defendants.

Defendants' Prayer No. 11.

That according to the undisputed evidence in this case, the United States has blended and failed to segregate the cost of the completion of the work under contract of October 23, 1906, and the cost of completion of the work under the unexecuted supplemental contract dated March 6, 1908, offered in evidence; and under the pleadings in this case, the verdict of the jury must, therefore, be for the defendants.

Defendants' Prayer No. 11½.

If the jury find from the evidence that the Superintendent of Construction did not act in good faith in annulling the contract offered in evidence; then, the verdict of the jury must be for the defendants.

Defendants' Prayer No. 12.

If the jury shall find from the evidence that on the eighteenth day of March, 1908, the Superintendent of Construction, Bernard R. Green, knew that large quantities of the granite stone referred to in the contract of October 23, 1906, had not been furnished to the defendant Frank F. Graham without unnecessary delay, and that only about eleven thousand cubic feet of the said granite had been furnished to said defendant on or before October 1, 1907, and that subsequently, during the months of December, 1907, January 1908, and February, 1908, great quantities of said granite had been shipped by the agents and servants of said Superintendent of Construction to the said Graham; and that such shipments on account of the season of the year could not be handled and cut by the said Graham without great additional expense; and that on account of said large shipment the stone-cutting yard of the said Graham had been so over-crowded that the work of cutting stone at that period of the year could not be profitably carried on by the said Graham, and that said Graham was suffering and would suffer serious financial losses on account of said overcrowding; and shall further find from the evidence that the said Superintendent of Construction knew that large quantities of said granite so furnished by his agents were not in net dimension blocks; and that on account of the sizes and shapes of said blocks, said Graham was and would be obliged to pay considerable sums of money for the freight on the additional stone in said blocks, and for the additional cost of cutting said stone; and shall further find from the evidence that the said Graham, through his attorney, informed the said Superintendent of Construction on or about March 15, 1908, that he had stopped work on the granite work of the south pavilion on account of the damage which he, Graham, had suffered by reason of the manner in which this matter had been gone on with on the part of the United States and its agents, and that he was ready amicably to adjust the matter on a fair and equitable basis between the parties; and shall further find from the evidence that said Superintendent of Construction told the Secretary of the Smithsonian Institution at or about the time at which he requested the said Secretary to sanction the annulment of said contract that the said Graham had thrown up his contract; then the jury are instructed that the said Superintendent of Construction did not act in good faith in seeking to annul said contract with the sanction of the said Secretary as representing the Regents of the Smithsonian Institution on March 18, 1908; and that under the pleadings, their verdict must be for the defendants.

Defendants' Prayer No. 13.

That according to the undisputed evidence, the work mentioned in the contract of October 23, 1906, was materially altered in that it was completed according to the following supplemental contract:

"Supplemental Contract,

Made and concluded this sixth day of March, nineteen hundred and eight, by and between Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, State of Maryland, of the second part:

Witnesseth, that whereas, a contract has heretofore been entered into between the parties hereto on the twenty-third day of October, nineteen hundred and six, for transportation from quarry, cutting, furnishing, and delivering at the site of the new building for the National Museum, in Washington, District of Columbia, the cut granite required for the south pavilion above the first floor level of the said building, for the gross sum of one hundred forty-nine thousand dollars ($149,000.00), and whereas, by reason of changes found desirable in the details of the design of the said cut granite by which the diameter of the drum of the dome is increased from 80 feet to 84 feet, the breadth of the column and pilaster caps increased to suit the sculptor's models, certain cornice courses increased in depth for greater stability of the wall, and panel stones of granite inserted in the U course, the said party of the first part has agreed and by these presents does agree with the said party of the second part, for himself, his heirs, executors and administrators, for and in consideration of the said changes, to pay to the party of the second part the sum of four thousand dollars ($4000.00) additional to the consideration in the said contract of October 23, 1906, increasing the sum total of the said contract to one hundred and fifty-three thousand dollars ($153,000.00).

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

——— ———,
Superintendent of Construction.

——— ———. [SEAL.]

Witnesses:

——— ———.

——— ———.

(Executed in triplicate.)

The Title Guaranty & Surety Co. of Scranton, Pa., the surety on the bond attached to the contract of October 23, 1906, between Bernard R. Green, Superintendent of Construction, and Frank F. Graham, for furnishing and delivering cut granite for the south pavilion of the building for the National Museum, which bond is dated the twenty-sixth day of October, 1906, does hereby consent to the change in said contract above named, and does hereby agree that said change shall not affect its liability on said bond in any manner whatever.

In witness whereof, the said The Title Guaranty & Surety Co. of Scranton, Pa., has placed its hand and caused its seal to be attached hereto this — day of March, nineteen hundred and eight.

Approved —— —, 1908, for the Regents of The Smithsonian Institution.

By —— ——, *Secretary.*

And that said contract was never executed; and that the changes mentioned therein were never assented to by The Title Guaranty & Surety Company; and the verdict of the jury, under the pleadings in this case, must, therefore, be for the defendants.

Defendants' Prayer No. 14.

That according to the undisputed evidence in this casee, the work under the contract of October 23, 1906, was materially altered; and under the pleadings in this case, the verdict of the jury must be for the defendants.

Defendants' Prayer No. 15.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the plaintiff to recover; and the verdict of the jury must, therefore, be for the defendants.

Defendants' Prayer No. 16.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the United States to recover against either of the defendants; and the verdict of the jury must, therefore, be for the said defendants.

Defendants' Prayer No. 17.

No evidence has been offered legally sufficient to prove that the Superintendent of Construction annulled the contract, offered in evidence, with the sanction of the Regents of the Smithsonian Institution; and the verdict of the jury must, therefore, under the pleadings in the case, be for The Title Guaranty & Surety Company.

Defendants' Prayer No. 18.

That according to the undisputed evidence, the work mentioned in the contract of October 23, 1906, was materially altered in that it was completed according to the following supplemental contract:

"*Supplemental Contract*

Made and concluded this sixth day of March nineteen hundred and eight, by and between Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, State of Maryland, of the second part;

Witnesseth, that whereas, a contract has heretofore been entered into between the parties hereto on the twenty-third day of October,

nineteen hundred and six, for transporting from quarry, cutting, furnishing, and delivering at the site of the new building for the National Museum, in Washington, District of Columbia, the cut granite required for the south pavilion above the first floor level of the said building, for the gross sum of one hundred forty-nine thousand dollars ($149,000.00), and whereas by reason of changes found desirable in the details of the design of the said cut granite by which the diameter of the drum of the dome is increased from 80 feet to 84 feet, the breadth of the column and pilaster caps increased to suit the sculptor's models, certain cornice courses increased in depth for greater stability of the wall, and panel stones of granite inserted in the U course, the said party of the first part has agreed and by these presents does agree, with the said party of the second part, for himself, his heirs, executors, and administrators, for and in consideration of the said changes, to pay to the party of the second part the sum of four thousand dollars ($4,000.00) additional to the consideration in the said contract of October 23, 1906, increasing the sum total of the said contract to one hundred and fifty-three thousand dollars ($153,000.00).

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

——— ———,
Superintendent of Construction.
——— ———. [SEAL.]

Witnesses:

——— ———.
——— ———.

(Executed in triplicate.)

The Title Guaranty & Surety Co. of Scranton, Pa., the surety on the bond attached to the contract of October 23, 1906, between Bernard R. Green, Superintendent of Construction, and Frank F. Graham, for furnishing and delivering cut granite for the south pavilion of the building for the National Museum, which bond is dated the twenty-sixth day of October, 1906, does hereby consent to the change in said contract above named, and does hereby agree that said change shall not affect its liability on said bond in any manner whatever.

In witness whereof, the said The Title Guaranty & Surety Co. of Scranton, Pa., has placed its hand and caused its seal to be attached hereto this — day of March, nineteen hundred and eight.

Approved ——— —, 1908, for the Regents of the Smithsonian Institution.

By ——— ———, *Secretary.*"

and that said contract was never executed; and that the changes mentioned therein were never assented to by The Title Guaranty & Surety Company; and the verdict of the jury, under the pleadings in this case, must, therefore, be for the said The Title Guaranty & Surety Company.

Defendants' Prayer No. 19.

Under the pleadings in this case, no evidence has been offered ally sufficient to entitle the United States to recover against The le Guaranty & Surety Company; and the verdict of the jury st, therefore, be for the said defendants-.

Defendants' Prayer No. 20.

No evidence has been offered legally sufficient to prove that the perintendent of Construction annulled the contract, offered in evi- ce, with the sanction of the Regents of the Smithsonian Institu- ; and under the pleadings in this case, the verdict of the jury st, therefore, be for the defendants.

Defendants' Prayer No. 21.

hat according to the undisputed evidence in this case, the work er the contract of October 23, 1906, offered in evidence, was so erially altered, without the assent of the surety, as to relieve the surety on the bond from liability; and the verdict of the jury t, therefore*m* be for The Title Guaranty & Surety Company.

Defendants' Prayer No. 22.

hat if the jury find from the evidence that the acts of the United s and the Thompson-Starrett Company prevented the defendant am from freighting, cutting, boxing and delivering complete to nited States all of the Bethel Granite required for part "C" of avilion, mentioned in the contract and specifications offered in nce, before October 1, 1907; and that the United States without g any further action in the premises under said contract, and knowing the work under said contract was not completed before er 1, 1907, and without notice to The Title Guaranty & Surety any, through its Superintendent of Construction, permitted raham to proceed on said work till March, 1908, and that the d States accepted said work from October 1, 1907, to March, ; then their verdict must be for The Title Guaranty & Surety any.

Defendants' Prayer No. 23.

t if the jury find from the evidence that there was unnecessary nreasonable delay on the part of the United States in deliver- anite stock to the defendant Graham free on board the cars at arry at or near Bethel, Vermont, and that said delay alone red it impossible for the said Graham to complete his con- by October 1, 1907; and that The Title Guaranty & Surety any was not notified by the United States of such delay at any efore October 1, 1907; then, the verdict of the jury must be for itle Guaranty & Surety Company.

Defendants' Prayer No. 24.

That if the jury find from the evidence that a substantial portion of the necessary granite stock was not furnished to the defendant Graham in net dimension blocks free on board cars at the quarry at or near Bethel, Vermont, and that the said Graham was without fault in the premises; then, the verdict of the jury must be for the defendants.

Defendants' Prayer No. 25.

No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case; and the verdict of the jury must, therefore, be for the defendants.

Defendants' Prayer No. 26.

No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case against The Title Guaranty & Surety Company; and the verdict of the jury must, therefore, be for the said defendant.

45. That the Court erred in affirming the action of the lower Court in using in its charge to the jury the language set forth in the following eighteen paragraphs and each of them:

First Paragraph.

"There obviously must be some excess of sizes, in order that the stone cutter can dress down the stone to the exact size and shape required to produce the surface on the stone called for."

Second Paragraph.

"That dimension blocks are those furnished by the quarry in sizes and dimensions from which the stone cutter can produce the desired stone of the dimension required by the setting plan."

Third Paragraph.

"What was understood by the parties to this contract to be meant by net dimension blocks is for you to determine from the weight of all the evidence which you have heard."

Fourth Paragraph.

"You must try to determine what was the meaning in this contract and if you can, you should reconcile this wide difference between the witnesses."

Fifth Paragraph.

"Mr. Graham has said, I think you will recall, that it was not expected that the blocks described as net dimension should be either sawed or cut before he received them, but might run two or three inches in excess of the dressed stone and that the rough stone should

ot average more than 225 pounds to the cubic foot of dressed meas-rement and should be often something less."

Sixth Paragraph.

"Now, it is for you to say whether on a fair average the rough one furnished complied with the stipulation that it should be fur-ished in net dimension blocks, as you find the meaning and inten-on of that stipulation was understood by the parties to the contract."

Seventh Paragraph.

"If you find that the stone furnished from the quarry was on a fair erage, such as the contract as so understood called for, then Graham uld not rightfully, on account of the sizes of the stone, abandon his ntract."

Eighth Paragraph.

"On February 10, 1908, Mr. Graham wrote to Mr. Green that he tended to devote his yard to the contract, the payments to be made him as previously which tends to show that up to that time, al-ough there had been complaints of the roughness of the stone, it ay have been on the whole average such as would gratify the con-act."

Ninth Paragraph.

"It is generally important to find out with regard to such a con-act what interpretation the parties themselves put upon when work-g under it. How they by their acts show that the- understood it."

Tenth Paragraph.

"And the Government has the right to require from Graham right-l compliance with his contract whether profitable to him or not and require that the surety shall answer under its bond for his de-ults."

Eleventh Paragraph.

"For that possibly may be the very reason why Graham failed to mplete it."

Twelfth Paragraph.

"But the proof is that, in point of fact, Graham did stop work, charged his men, and told them to look for other employment, l he did not intend to go on with the work until he got some ms from the Government, the terms of which we do not know."

Thirteenth Paragraph.

"It was said and there was no proof to the contract, that the prac-e is to leave all matters of detail and matters such as this to the retary of the Institution. For a long time, they have allowed n to exercise these powers."

Fourteenth Paragraph.

"Mr. Green stated that in his judgment the contract should be annulled because of the failure of the defendant, and therefore the annulment was made. I can see no ground for saying to the jury that the contract was not annulled."

Fifteenth Paragraph.

"The Secretary, acting for the Regents, gave his consent to the annulment in the proper manner."

Sixteenth Paragraph.

"There is no evidence in my judgment to show that the annulment was the result of any bad faith on the part of Mr. Green. Mr. Green has acted within his rights, and as the agent of the Government, it was his duty to protect the interests of the Government. I do not think that he has gone beyond the limits of his power."

Seventeenth Paragraph.

"If the stone was ready for delivery on board the cars in advance of the care being furnished to receive it and if the Government, by its agents, made all reasonable efforts to see that cars were furnished, then the defendant Graham was not justified in abandoning his contract, even though the cars came irregularly and not promptly."

Eighteenth Paragraph.

"The Government, by its contract, did not bind itself to furnish transportation for the stone, it was to be delivered to Graham at Bethel at the quarry and was after that at his risk and cost of transportation until delivered by him at the government grounds at Washington."

46. That the Court erred in affirming the action of the lower Court in using in its subsequent instructions to the jury during the argument of counsel for the defendants (Mr. Harley), who was interrupted for that purpose, the language embraced in the following six paragraphs and each of them:

"I have said more than once it was not the duty of the Government to fusnish the cars. I have said that I thought it was the duty of the Government to co-operate with the parties who were shipping the stone in a reasonable manner, in order to facilitate the shipment. The furnishing of the cars was at the risk of Graham. I do not see that that letter throws any light on the furnishing of the cars." (Referring to the letter of February 8, 1908, from Bernard R. Green, Superintendent of Construction, to Thompson-Starrett Company.)

Second Paragraph.

"In a contract of that kind, I think there was an obligation on both parties to furnish cars—that reasonable efforts should be made to accommodate each other."

Third Paragraph.

"I say to you and to the jury that there is no evidence of delay, because the cars were not furnished. It was not the duty of the Government to furnish the cars."

Fourth Paragraph.

"I have said that the question of delay should be ruled out of the case. Graham never raised the question of delay. They never charged him with default because it was not delivered up to the time."

Fifth Paragraph.

"I do not think there is evidence upon which the jury would be allowed to say that Graham was justified in abandoning the contract on account of delay in the delivery of the stone. I do not think that can be shown. You may argue upon the fact of the difficulties of proceeding with the contract because of the excessive weight of the stone and the way in which it was delivered at the quarry. That may be dwelt upon; but as a distinct issue, that the jury may find against the Government, because the stone was not delivered in time, I have said there was no sufficient evidence."

Sixth Paragraph.

"I ought not to let the jury find against the Government now, because of delay in furnishing the stone, because there never was an issue distinctly raised. Graham said 'I am going on now. I am going to devote my whole yard to the performance of the contract.' That letter which Graham writes urging upon the quarryman to furnish the stone, I do not understand that that means they made no efforts."

47. That the Court erred in affirming the action of the lower Court in permitting the United States' Attorney for the District of Maryland (Mr. Hill) during his closing argument before the jury, to read, over and against the objections of the defendants, from the letter head of a certain letter which was in evidence, as will more fully appear from assignments of errors Nos. 15, 16, and 18, the words following:

"Fidelity Judicial. We issue surety bonds. Contract Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and surplus over $1,000,000.00," and to say immediately thereafter "There is no room for sympathy for the poor defendant in this case."

48. That the Court erred in affirming the action of the lower Court in entering judgment against the plaintiffs in error.

Wherefore, the said Frank F. Graham, and The Title Guaranty & Surety Company, and Burdette B. Webster, trustee for Frank F. Graham, bankrupt, and each of them, pray that the judgment in

said cause, for the errors aforesaid, may be reversed by the Supreme Court of the United States.

GEORGE R. GAITHER,
Counsel for the Plaintiff in Error, Frank F. Graham.

CHARLES F. HARLEY,
Counsel for the Plaintiff in Error, The Title Guaranty & Surety Company.

JOHN B. A. WHELTLE,
Counsel for Burdette B. Webster, Trustee for Frank F. Graham, Bankrupt.

Order Allowing Writ of Error.

Filed July 22, 1911.

In the Supreme Court of the United States.

FRANK F. GRAHAM and THE TITLE GUARANTY & SURETY COMPANY, Plaintiffs in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

The Title Guaranty & Surety Company, Frank F. Graham, and Burdette B. Webster, trustee for Frank F. Graham, bankrupt, plaintiffs in error, having filed their petition in the above entitled cause wherein they pray for the allowance of a writ of error directed to the United States Circuit Court of Appeals for the Fourth Circuit, and it appearing from the said petition and the certified transcript of the record of said cause in said court that the matter in controversy exceeds the sum of one thousand dollars besides costs and exceeds the sum of fifty thousand dollars besides costs, and that the case is not one in which the decision of the Circuit Court of Appeals is made final, and is a proper cause to be reviewed by this Court, and that it arose under the laws and statutes of the United States, and that the jurisdiction of the said Circuit Court was not dependent upon the opposite parties to the controversy being aliens and citizens of different states, and that it did not arise under the patent laws or the revenue laws or under the criminal law, but out of a contract which draws into question the construction and application of the statutes and laws of the United States, and that a bond in the sum of One thousand dollars is sufficient security to fully indemnify and save harmless the defendant in error herein:

Now, therefore, the prayer of said petition is hereby granted, and a writ of error from this Court to the United States Circuit Court of Appeals for the Fourth Circuit is hereby directed to be issued.

Done this 19 day of July, 1911.

HORACE H. LURTON,
Justice of the Supreme Court of the United States.

Writ of Error Bond.

Filed July 22, 1911.

In the Supreme Court of the United States.

FRANK F. GRAHAM and THE TITLE GUARANTY & SURETY COMPANY, Plaintiffs in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, that we, The Title Guaranty & Surety Company, a body corporate, as principal, and the Fidelity & Deposit Company of Maryland, a body corporate, as surety, are held and firmly bound unto The United States of America in the full and just sum of one thousand dollars to be paid to the said United States of America, or its certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. Sealed with our seals and dated this thirteenth day of July, in the year of our Lord one thousand nine hundred and eleven.

Whereas the above named principal, The Title Guaranty & Surety Company, plaintiff in error, has prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above entitled suit by the United States Circuit Court of Appeals for the Fourth Circuit;

Now, the condition of the above obligation is such, that if the said The Title Guaranty & Surety Company shall prosecute its said writ of error to effect, and answer all damages and costs, if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TITLE GUARANTY & SURETY COMPANY,
By B. P. KEATING, *Its Vice-President.*

[Seal of the Title Guaranty & Surety Company.]

Attest:
J. H. LAW, *Secretary.*

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By EDWIN WARFIELD, *Its President.*

[Seal of the Fidelity & Deposit Company of Maryland.]

Attest:
EDGAR A. DOBSON, *Ass't Sec'y.*

Sealed and delivered in the presence of

—— ——.

Approved by

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

Order Staying Mandate.

Filed July 22, 1911.

In the Supreme Court of the United States.

FRANK F. GRAHAM and THE TITLE GUARANTY & SURETY COMPANY, Plaintiffs in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

Upon the application of The Title Guaranty & Surety Company, a body corporate, one of the plaintiffs in error, for an order superseding a judgment rendered in the United States Circuit Court of Appeals for the Fourth Circuit, sitting at Richmond, in the State of Virginia, wherein the above entitled plaintiffs in error were plaintiffs in error and the above entitled defendant in error was defendant in error therein, which cause is numbered 1014 according to the method of numbering said causes in said court, which judgment affirmed a certain judgment of the Circuit Court of the United States for the District of Maryland, rendering judgment in favor of said defendant in error and against the said plaintiffs in error, and whereas a writ of error has been allowed from this court to the United States Circuit Court of Appeals for the Fourth Circuit to this court for the purpose of reviewing the correctness of said judgment, and that a bond conditioned as required by statute in a sum fixed by the court as sufficient has been approved and filed;

Now, therefore, it is hereby ordered that the said bond filed herein on behalf of The Title Guaranty & Surety Company shall operate as a supersedeas and shall supersede the judgment rendered in said cause by the United States Circuit Court of Appeals for the Fourth Circuit as against the said The Title Guaranty & Surety Company; and said judgment is hereby superseded and execution thereon stayed as to the said The Title Guaranty & Surety Company until this court shall have reviewed and passed upon the correctness of said judgment, and the Clerk of this Court is hereby directed to notify the Clerk of said United States Circuit Court of Appeals for the Fourth Circuit of the entry of this order and request him to delay the issuance of a mandate upon said judgment, and to stay any execution thereof until the further order of this Court.

Dated this July 19, 1911.

HORACE H. LURTON,
Justice of the Supreme Court of the United States.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Frank F. Graham and The Title Guaranty & Surety Company, plaintiffs in error, and The United States of America, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty first day of July, in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United Stat

Allowed by
HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

Citation.

ITED STATES OF AMERICA, *ss:*

the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's ce of the United States Circuit Court of Appeals for the Fourth uit wherein Frank F. Graham and The Title Guaranty & Surety pany are plaintiffs in error and you are defendant in error, to

show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Horace H. Lurton, Associate Justice of the Supreme Court of the United States, this 19th day of July, in the year of our Lord one thousand nine hundred and eleven.

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

Service of a copy of the above citation is acknowledged this 21st day of July, 1911.

F. W. LEHMANN,
Solicitor General.

H.

Order to Transmit Record.

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:—

HENRY T. MELONEY, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 28th day of July, A. D., 1911.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

Endorsed on cover: File No. 22,826. U. S. Circuit Court Appeals, 4th Circuit. Term No. 750. Frank F. Graham and The Title Guaranty & Surety Company, plaintiff in error, vs. The United States of America. Filed July 29th, 1911. File No. 22,826.

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FILED
OCT 1 1913
JAMES D. MCKENNEY,
CLERK.

BRIEF OF PLAINTIFFS IN ERROR

IN THE

Supreme Court of the United States

No. 76.

FRANK P. GRAHAM AND THE TITLE GUARANTY AND SURETY COMPANY,
Plaintiffs in Error,

versus

THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Kiwo Bros., Printers, Baltimore, Md.

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BRIEF OF PLAINTIFFS IN ERROR

IN THE

Supreme Court of the United States.

FRANK F. GRAHAM AND THE TITLE GUARANTY AND SURETY COMPANY,

Plaintiffs in Error,

versus

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 76.

STATEMENT OF CASE.

The Act of Congress, approved March 3, 1903, in the following language, authorized the erection of a National Museum at Washington:

"Building for National Museum: To enable the Regents of the Smithsonian Institution to commence the erection of a suitable fireproof building with granite fronts, for the use of the National Museum, to be erected on the north side of the Mall, between Ninth and Twelfth streets northwest, substantially in accordance with the plan A, prepared and sub-

mitted to Congress by the Secretary of the Smithsonian Institution, under the provisions of the Act approved June 28, 1902, $250,000. Said building complete, including heating and ventilating apparatus and elevators, shall cost not to exceed $3,500,000, and a contract or contracts for its completion are hereby authorized to be entered into, subject to appropriations to be made by Congress. The construction shall be in charge of Bernard R. Green, Superintendent of Buildings and Grounds, Library of Congress, who shall make the contracts herein authorized and disburse all appropriations made for the work, and shall receive as full compensation for his services hereunder the sum of $2,000 annually in addition to his present salary, to be paid out of said appropriations."

Pursuant to this authority, on October 23, 1906, "Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America," and Frank F. Graham, as the party of the second part, entered into a contract, under the terms of which Mr. Graham undertook to "transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry at Bethel, Vermont, required for that portion of the South Pavilion above the first floor level of the said building for the National Museum, in Washington, District of Columbia, described as part 'C' in the said specifications, and do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions, all for the gross sum of one hundred forty-nine thousand dollars ($149,000.00)." (Record, 57 and 58.)

The contract further provided that, if the party of the second part "shall in the judgment of the Superintendent of Construction, fail to prosecute faithfully and diligently

the work in accordance with the specifications and requirements of this contract, then * * * the party of the first part, or his successor legally appointed, shall have power, *with the sanction of the Regents of the Smithsonian Institution, to annul* this contract by giving notice in writing to that effect to the party of the second part." (Record, 58.)

The declaration, which contains but one count, was drawn by a distinguished lawyer, Judge Rose, who now graces the Federal Bench.

This narr. declares solely on the annulment of this contract *with the sanction of the Regents.* (Record, 3 and 4.)

The plaintiff must, therefore, recover on that annulment and that sanction, or it must fail in this action.

In another paragraph of the contract was the following stipulation:

"It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, that the party of the first part may with the prior sanction of the Regents of the Smithsonian Institution, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or

other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract." (Record, page 59.)

The specifications "which form a part of this contract," contain these provisions:

"The granite stock for the whole part of 'C' will be from the quarry at Bethel, Vermont, from which the stone for the first and second stories is now being taken, and it is proposed to use the same granite in the remaining parts, 'A' and 'B' of the South Pavilion work."

"The necessary Bethel granite stock, in net dimension blocks, is to be furnished to the Government by the present contractor, free on board cars at the quarry in Bethel, ready for the contractor for the cutting of the granite to transport it to his cutting yards for that purpose."

"Bidders for the Bethel granite work will therefore bid on the basis and understanding that the granite, in net dimension blocks, one block for each separate pattern will be furnished to them without unnecessary delay and without charge, free on board cars at the quarry at Bethel, Vermont."

"*Proposal No.* 1. For freighting, cutting, boxing and delivering complete all of the Bethel granite required for part 'C' of the pavilion, before October 1, 1907."

"The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at one-quarter inch to the foot scale (¼ in.—1 ft.), prepared, lettered and numbered as may be directed by the

Superintendent of Construction and submitted to him not less than one month prior to the commencement of the work on the cutting of the stones they represent, to give ample time for examination and approval. The setting plans for the lower courses of the basement story (the first courses to be cut) must be prepared and submitted immediately after execution of the contract." (Record, pages 41, 42 and 43.)

The general conditions, also forming a part of the contract, state: "Payments will be made from time to time as the progress of the work may warrant. A percentage of ten per centum will be reserved from each payment until the whole of the cut granite called for by the annexed contract, shall have been satisfactorily delivered and accepted." (Record, 53.)

On October 26, 1906, Frank F. Graham as principal and The Title Guaranty and Surety Company as surety executed in favor of the United States a bond with a penalty of $50,000, providing as follows with reference to the contract of October 23, 1906:

"Now, therefore, if the above-bounden Frank F. Graham, his heirs, executors or administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Frank F. Graham to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue." (Record 56 and 57.)

This action was brought in debt on *this bond*, upon the averment that the "said Superintendent of Construction

with the *sanction of the Regents* of the Smithsonian Institution, did annul the said contract by giving notice in writing to that effect to the said Frank F. Graham." (Record, 4.)

Mr. Graham incurred considerable expense in special preparation for this work which was to have been completed within about eleven months. On the other hand, during a most important phase of this term, the Superintendent of Construction was absent in Europe and elsewhere for about three months. (Record, 262, 277, 312, 354, 624.)

Our setting plans were delayed in his office in some instances for months before final approval. The granite was not delivered to us without "unnecessary delay." The quarry at Bethel, Vermont, was controlled by the Thompson-Starrett Co. This company, besides being an unsuccessful competitor for the Graham job, had a contract for cutting large quantities of stone taken out of this quarry for use in this very building. It furnished all, and cut some, of the Bethel granite. It gave itself as a cutter all the advantage in time of delivery; and it is a salient fact in the case that it furnished to Graham only about 10,000 cubic feet of stone prior to October 1, 1907, although we had succeeded in having approved by the Superintendent on or before February 9, 1907, setting plans for more than 14,000 cubic feet. On October 1, 1907, the company completed its own cutting contract; and then coincidentally the cry of car shortage ceased, and stone was shipped to Graham in quantities too large for him to handle in the winter season, when the granite cutter's efficiency is much impaired.

Besides, the United States agreed to furnish Graham with granite in "net dimension blocks;" but the government's agreement with the Thompson-Starrett Co. did not require it to quarry "net dimension blocks;" and as a natural consequence Mr. Graham did not get "net dimension blocks." This is of the greatest importance, as the size of the block,

over and above the cube which is to be cut from it, increases the amount of freight and the cost of cutting. A surplus of six inches would cost in labor alone six times as much to cut as an excess of one inch. There is ample testimony that a "random" stone is a large and rough one, not quarried with reference to any particular dimensions. A "dimension block" is quarried reasonably near the dimensions of the cube which is to be cut from it. There is some disparity in the testimony as to what is reasonably near. Several of the witnesses had never seen in specifications for granite cutting the term "net dimension block;" but others testified that "net" intensified the words "dimension block," and that it meant "net." This makes the finest pattern, the cheapest to cut. Indeed, the expense is incomparably less than cutting rough stones with considerable excess. The Thompson-Starrett Co., not being obliged to furnish this class of pattern, did not furnish it; and Mr. Graham's labor and freight bills were greatly increased.

Besides, the 90 per cent. payments were not made as the progress of the work reasonably warranted. These delays, the furnishing of rough stones, additions to the work by the Superintendent, without reasonable compensation, the failure to make reasonable payments, the massing of large quantities of stone in Graham's yard in the winter weather, when but little work can be done, without leaving room to work in, the arbitrary conduct of the Superintendent forced Mr. Graham to cease work, in the hope of a reasonable adjustment and a renewal of action. Indeed, he was starved and bankrupted by these injustices.

But the Superintendent proceeded to declare the contract annulled. It is a *concessum* of the case, however, that the "sanction of the Regents of the Smithsonian Institution" was never actually obtained; and we will contend that this provision of the contract, which lies at the foundation of the government's suit and upon which the declaration itself is

based, means what it says, and that the surety had a right to rely upon it as a wise safeguard against such unfair or arbitrary treatment as might be expected from smaller men. The Regents never acted upon the matter; and a formal endorsement of the Superintendent's alleged annulment by the Secretary, whose duties are plainly prescribed and limited by law, is not, we submit, the sanction of the Regents, although the court below so held.

Mr. Green proceeded to do the work himself; he erected a plant, purchased tools, charged their cost against the contract, and forgot to give Graham any credit whatever for their value. Mr. Graham cut 27,507 cubic feet and received therefor $59,400; the government cut 31,861 cubic feet and charged for its work $145,680.75. (Record, 469 and 761.)

In the alleged bill of costs, charges for work under the contract and extras and alterations are hopelessly blended. Indeed the whole record shows an unfair and arbitrary treatment of Mr. Graham by the Superintendent of Construction. Even when he was inflicting upon Mr. Graham the greatest hardships, consistently with his general policy so aptly explained by his chief clerk in the record at pages 849 and 850, he was constantly urging him on to some new difficulty.

The suit is brought on the bond for failure to observe the agreement "according to the true intent and meaning of the said contract." (Record, 3 and 56.)

The United States declares specifically upon the annulment of the contract "with the sanction of the Regents of the Smithsonian Institution," alleging as a cause for said annulment that "on the 18th day of March, 1908, the said Frank F. Graham in the judgment of the said Superintendent of Construction did fail and had failed to prosecute faithfully and diligently the work in accordance with the specifications and requirements of said contract."

At the trial of the case, the Court withdrew from the consideration of the jury several of the issues, and by its own

instructions and the granted prayers of the plaintiff restricted the inquiry to exceedingly narrow limits, leaving little or nothing for the jury to decide.

The verdict was for the United States for the penalty of the bond to be released upon the payment of $50,000 and costs; the judgment entered thereon was affirmed by the Circuit Court of Appeals for the Fourth Circuit; and the case is now here on writ of error.

The record, we submit respectfully, discloses numerous errors to our great damage; and we will proceed to specify them. The record is necessarily so large that counsel can hope merely to indicate, without any extended argument, the points involved.

SPECIFICATION OF ERRORS.

(1) That the court erred in sustaining the plaintiff's demurrer to the third plea of Frank F. Graham to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

(2) That the court erred in sustaining the plaintiff's demurrer to the third plea of The Title Guaranty & Surety Company to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

(3) That the court erred in sustaining the plaintiff's demurrer to the fourth plea of Frank F. Graham to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

(4) That the court erred in sustaining the plaintiff's demurrer to the fourth plea of The Title Guaranty & Surety Company to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

(5) That the court erred in sustaining the plaintiff's demurrer to the fourteenth plea of Frank F. Graham to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

(6) That the court erred in sustaining the plaintiff's demurrer to the fourteenth plea of The Title Guaranty & Surety Company to the plaintiff's declaration and in entering judgment thereon for the plaintiff.

(7) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's counsel propounded to witness Richard Rathbun:

"Now, will you just state how this approval was made and what the approval of the Smithsonian Institution means?"

Answer: The approval was made by the Secretary of the Smithsonian Institution, or by the Acting Secretary, who, by law, is given the same authority in his absence. The answer to the latter part of the question is simply this, that the Secretary of the Smithsonian Institution is actually or virtually the director of the Smithsonian Institution—I am not giving this as a matter of opinion, I would like to say, but as something which is contained in the documents of the Government. It is printed in statutes among the Acts of Congress, and I am not giving it as my opinion at all, but a reference to the documents will show the Secretary of the Institution——

(8) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's counsel propounded to witness Richard Rathbun:

"You are referring to the documents of the Smithsonian Institution aren't you?

Answer: "The Secretary is given entire authority to plan and conduct the operations of the Smithsonian Institution by resolution of the Board of Regents, which is repeated every year. It is only subsequently that the accounts are examined by the Board of Regents or the Executive Committee."

(9) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Charles D. Walcott:

"Under what authority did you sign this letter of March 18, 1908, in which you approved the annulment of the contract?

Answer: "Under the authority—I don't recall the Acts by which the authority is granted—but it has been the general custom and practice—for the Secretary to approve of all contracts, agreements and matters relating thereto in connection not only with the construction of the present National Museum building, but also of other similar matters which may have come *up* from time to time."

(10) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Charles D. Walcott.

"How old is this custom if you know?"

Answer: "My personal recollection is that it dates back to 1856."

(11) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Bernard R. Green:

"Mr. Green, in the Articles of Agreement it is stated that you made the agreement as Superintendent of Construction acting under the direction of the Regents of the Smithsonian Institution. Why was that put in there, and did you act under that direction?

Answer: "It was put in there for propriety. I was in charge of the construction of the Museum under the law, but as the building was being erected for the purpose of the new National Museum, under the management, practically, of the Regents of the Smithsonian Institution—as the Museum has always been under their management and still is and was at the time—as a matter of courtesy, as the law itself did not specify particularly what my relations to the Institution would be, I naturally supplied the deficiency by assuming that the building should be constructed as the Regents of the

Smithsonian Institution, who were in charge of the Museum, desired it to be. It was not my desire to go on and contract the National Museum without consulting the wishes of the Regents, as the law did not specify the details, and I wanted to build the building in conformance with their wishes as far as I could do it. I had no reason to feel and have none since that I should go in any way contrary to the wishes and desires of the Regents of the Smithsonian Institution in this matter. That was why that was put into the contracts and their approval obtained to all the contracts which really covered most of the proceedings towards the construction of the building."

(12) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to witness Bernard R. Green:

"Mr. Green, before writing these two last read letters" (being letters from said witness dated March 18, 1908, to the defendants and purporting to annul the contract of October 23, 1906) "did you consult with the authorities of the Smithsonian Institution?"

Answer: "I do not remember specifically. I am quite sure I did, because I was in consultation and discussion with the Secretary who represented the authorities, about the whole matter while it was in progress."

(13) That the court erred in refusing to grant the defendants' motion to strike out as voluntary and irresponsive that portion of said answer appearing in the twelfth assignment of error immediately after the word "Secretary," and reading as follows: "Who represented the authorities, about the whole matter while it was in progress."

(14) That the court erred in admitting evidence on behalf of the plaintiff as follows that is to say, permitting the witness Bernard R. Green, to read to the jury the printed letter head of a letter dated April 11, 1908, from Philip Walker to Bernard R. Green, the said letter head being no

part of the body of said letter: "Fidelity—Judicial. We issue surety bonds. Contract—Official. The Title Guaranty & Surety Company. Home Office: Scranton, Pa. Capital and Surplus over $1,000,000.00," (said figures being printed in red ink). Philip Walker, Attorney. George T. Parker Company, General Agent. 201-227 Colorado Building. 'Phone, Main 3491. Worthington, Heald & Frailey, Local Counsel, Washington, D. C.' "

(15) That the court erred in admitting evidence on behalf of the plaintiff as follows, that is to say, permitting the witness Bernard R. Green to read to the jury the printed letter head of a certain letter dated April 15, 1908, under the following circumstances:

Question propounded to witness Bernard R. Green:

"Here is a letter dated April 15th, 1908, signed Philip Walker, addressed to you. If you received this letter, read the whole of it including the printed heading at the top of the letter both in black and red ink, as you did the prior letter.

Answer: "As I said I received this letter from Philip Walker, dated April 15, 1908. The sheet contains this: 'Fidelity Judicial. We issue surety bonds. Contract Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and Surplus over $1,000,000.00, (said figures being printed in red ink) Philip Walker Attorney. George T. Parker Company, Genl. Agt., 201-227 Colorado Building. 'Phone: Main 3491. Worthington, Heald & Frailey, Local Counsel.' "

(16) That the court erred in admitting evidence on behalf of the plaintiff as follows, that is to say, a letter dated April 15, 1908, from Philip Walker to Bernard R. Green:

"Washington, D. C., April 15, 1908.

Bernard R. Green, Esq.,
Superintendent of Construction,
Library of Congress, City.

Dear Sir:

I have a letter from our attorney in Baltimore today, from which I quote the following for your information:

'In response to your favor of the 11th instant enclosing letter from Superintendent of Construction Bernard R. Green under date of April the tenth and copy of your response thereto of April 11th, I beg leave to advise you that I have had a conference with Mr. Scherf this morning.

"I fail to see why Mr. Green should have to ask anybody for his property. The stone belongs to the Government; and Mr. Scherf has advised me that Mr. Mr. Graham will not contest the right of the Government to take its own property.

'However, as to the use of Mr. Graham's machinery, I have not been able to make any arrangements with Mr. Scherf. I had hoped to make an engagement by which you could see Graham himself today. Indeed, Mr. Scherf promised to arrange this, but later notified me that it would not do any good.

'The question now seems to be what arrangement can you make with Graham for the use of his machinery for the purpose of moving the stone.'

'If no arrangement can be made, Superintendent Green will simply have to move this Government property without the aid of Graham's appliances.'

Yours very truly,

PHILIP WALKER."

(17) That the court erred in admitting evidence on behalf of the plaintiff as follows, that is to say, permitting the witness Bernard R. Green to read to the jury the printed letter head of a certain letter dated November 23, 1906, under the following circumstances:

Question propounded to witness Bernard R. Green:

"Mr. Green, I here show you a letter of November 23rd, 1906, addressed to you and signed George T. Parker, General Agent, and referring to an inclosure. Please look at this letter and if you received it, read to the jury, reading the same time the heading as before.

Answer: "I received from Mr. George T. Parker, General Agent, this letter dated 23rd of November, 1906. The sheet contains this: "Fidelity Judicial. We issue Surety Bonds. Contract Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and Surplus over $1,000,000.00, (said figures being printed in red ink) Worthington, Heald & Frailey, Local Counsel. George T. Parker, General Agent, 201-227 Colorado Building. 'Phone: Main 3491. Philip Walker, Attorney.

"Washington, D. C., 23 November, 1906.

Bernard R. Green, Esq.,

Superintendent, Library of Congress,

Washington, D. C.

Dear sir:

Herewith I have the honor to hand you for file certified copy of Power of Attorney authorizing George T. Parker, Philip Walker, Willis W. Parker and William R. Parker, or any two of them, to execute bonds for this company.

Kindly acknowledge receipt of the same, and oblige,

Yours respectfully,

GEORGE T. PARKER,

Inclosure, J. M. General Agent."

(18) That the court erred in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you ever communicate to the Regents of the Smithsonian Institution the changes made by you in setting plan No. 20?"

(19) That the court erred in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"I want to ask you whether you have communicated to the Regents of the Smithsonian Institution the long delays that were occasioned by you and your office in approving the setting plans submitted by Mr. Graham?"

(20) That the court erred in refusing to allow the counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution the fact that you had made numerous and material changes in the plans for this building?"

(21) That the court erred in refusing to allow counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution the fact that you were responsible for delay in approving these plans?"

(22) That the court erred in refusing to allow counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"Did you communicate to the Regents of the Smithsonian Institution at any time the fact that the Government had not delivered to Mr. Graham with promptness the granite F. O. B. in net dimensions at the quarry in Bethel, Vermont?"

(23) That the court erred in refusing to allow counsel for the defendants to ask the witness Bernard R. Green on cross-examination the following question:

"You have nothing here to show, then, how many cubic feet of stone you cut on the Graham job?"

(24) That the court erred in saying to counsel for defendants in the presence of the jury immediately after the propounding of the question mentioned in the twenty-third assignment of error:

"You can not expect a man in charge of a big job like this to carry all those figures in his mind."

(25) That the court erred in using in the presence of the jury the following language:

"The contract says that the payments shall be made from time to time as the progress of the work may warrant. Surely the man who is to make the payments is the man to judge how much is warranted."

(26) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Bernard R. Green on re-direct examination:

"On page 424 of the record, your cross-examination, and on page 425, questions were asked you in reference to your absence from Washington; could or could not the work under the Graham contract be continued during your absence from Washington by your office force in Washington?"

Answer: "It could be continued, and it was continued perfectly well."

(27) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Bernard R. Green on re-direct examination:

"Doesn't a comparison of the blue print marked 'Superseded' and bearing upon it the endorsement 'Approved October 21, 1907,' and the tracing marked 'Approved January 29, 1908,' show that in the preparation of the first setting plan an error had been made by Mr. Graham or his draftsman in the quantity of stone shown upon the courses?"

Answer: "It shows that this is a new tracing. The original tracing evidently from which this blue print was made, bears my approval marked 'October 21, 1907.' The similar approval marked and placed upon the new tracing in a simi-

lar spot shows that there was no previous signature or approval marked on that. That is perfect evidence to my mind that this is a new tracing made from the original one and that the stones are corrected upon it."

(28) That the court erred in using in the presence of the jury the following language:

"This is as slow as cutting granite."

(29) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Albert L. Harris:

"What is the usual form for furnishing setting plans that you have come across in your experience of twenty-one years in architecture?"

Answer: "The usual form is the form as stated in Mr. Green's letter."

(30) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness William Pirie:

"Now, will you state whether or not the material shown in all these vouchers was received at the building, if you know; personally?"

Answer: "I will state to the jury that I spent Saturday reading them over and there was no voucher for material that we did not receive."

(31) That the court erred in addressing to counsel for the defendants in the presence of the jury the following language:

"I can not see why you emphasize that of being of such supreme importance."

(32) That the court erred in addressing to counsel for the defendants in the presence of the jury the following language:

"I think you are rather violent with the witness, and I cannot see that it is of such supreme importance."

(33) That the court erred in admitting in evidence on behalf of the plaintiff in the testimony of the witness Frederick R. Freas, the "gate rolls."

(34) That the court erred in admitting in evidence on behalf of the plaintiff in the testimony of the witness Frederick R. Freas, the "time books, just the small Library books."

(35) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Frederick R. Freas:

"Now, of all those vouchers which you looked over, can you state whether or not there was anything included in those vouchers, any item which was not received on the contract No. 25?

Answer: "I believe there are no vouchers in there—when I saw them the other evening there was some made out at the Library Office, but we received the goods."

(36) That the court erred in admitting evidence on behalf of the plaintiff as follows:

Question propounded to the witness Vernon H. Hagan:

"Can you state whether or not the time and the names of the men as shown on those pay rolls are correct, as compared with the gate roll and time books?"

Answer: "They are correct."

(37) That the court erred in refusing to admit evidence on behalf of the defendants as follows:

The original contract dated October 17, 1904, and the specifications annexed thereto as a part thereof, between Bernard R. Green, Superintendent of Construction, and the Thompson-Starrett Company, the full substance of said rejected evidence being as follows:

BUILDING FOR THE NATIONAL MUSEUM.

Washington, D. C., Sept. 1, 1904.

SPECIFICATIONS

FOR

CUT GRANITE FOR EXTERIOR AND COURT WALLS EXCLUSIVE OF SOUTH PAVILION.

Description and Conditions.

1.

The cut granite called for in the foregoing advertisement and described in these specifications, comprises all the stones necessary to the construction of the facades of all the exterior walls of the building (exclusive of the South Pavilion) and all the stones required for the walls of the two courts, as further described below and as represented in the twenty-five (25) sheets of drawings Nos. 14 to 38, both inclusive, prepared by

HORNBLOWER AND MARSHALL,
Architects, Washington, D. C.

2.

The several drawings are as follows:

No. 14, Block Plan.
Nos. 15, 16, 17, Basement Plan.
Nos. 18, 19, 20, First Floor Plan.
Nos. 21, 22, 23, Second Floor Plan.
Nos. 24, 25, 26, Third Floor Plan.
Nos. 27, 28, 29, 30, Exterior Elevations, East and West Court Elevations.
Nos. 31, 32, Court Elevations.
Nos. 33, 34, 35, 36, 37, 38, one-half inch scale details.

3.

The exterior wall fronts are to be wholly of granite.

4.

The court walls will be mainly of brick trimmed with the granite herein called for and as shown in the drawings.

5.

Figures on the drawings are to be taken wherever they occur in preference to scale dimensions.

All explanations and notes on the drawings are to be considered a part of the drawings and used as such.

6.

Any discrepancies or obscurities discovered in the drawings or specifications, or both, must be immediately brought to the notice of the Superintendent of Construction for explanation before proceeding with any work affected by them.

7.

The contractor shall, at his own expense, prepare full and complete sets of setting plans of the stone work, showing fully every separate stone in the work. These plans shall be tracings at not less than one-quarter inch to the foot scale (¼ in. —1 ft.), prepared as may be directed by the Superintendent of Construction and submitted to him not less than one month prior to the commencement of work on the cutting of the stones they represent, to give ample time for examination and approval. The setting plans for the lower courses of the basement story (the first courses to be cut) must be prepared and submitted immediately after execution of the contract.

8.

In laying out these drawings the courses of stone are to be lettered, as shown in the original drawings, in two series of

letters, namely: Beginning at the first course above the water table, A, B, C, upward to the end of the alphabet, the remaining courses at the top of the wall to be Az, Bz.

Beginning at the water table, the basement story will be double-lettered downward, AA, BB, CC, to the bottom course HH.

In the courts a separate series of letters will be used from the ground to the cornice. The several stones of each course will be numbered serially from the east side of the south pavilion entirely around the building to the west side of same for the front walls, and a similar but separate number series will be used around the east court and continued into and around the west court. Thus no two stones in the bulid-ing will have the same mark.

9.

Blue or white prints of these drawings, mounted on muslin, not exceeding twelve of each sheet, shall be furnished at his own cost by the contractor to the Superintendent of Construction promptly as may be called for from time to time for the use of his office and operations on the building.

10.

Each and every cut stone shall be marked by the contractor before shipment from the cutting yards, plainly with indelible black paint, both on an end joint of the stone and the outside of the boxing, with its proper course letter and number.

11.

As soon as each stone is finished and accepted by the Government inspector at the cutting yards, it must be carefully and substantially boxed with stout lumber that will not stain the stone and strapped and secured with galvanized iron and

galvanized nails. This boxing shall be at least as good as the inspector may approve of, but the contractor will remain responsible for the safe delivery of the stone on the site of the Museum building.

12.

The preparation and delivery of the stone must proceed as nearly as may be directed by the Superintendent of Construction in the natural order of building.

13.

The drays delivering stone at the site of the building shall haul the loads to points designated by the Master Mechanic. They will there be unloaded and the stones piled by the United States.

14.

The contractor shall provide all necessary patterns, gauges, templates, squares, edges, tools, implements, machinery, buildings, materials, labor, etc., and transportation for the most prompt, expeditious and complete performance of all work involved in furnishing, preparing and delivering at the site of the building all of the cut and rough granite called for in his contract.

15.

Full size profiles will be supplied to the contractor by which he shall accurately make the necessary templates and patterns.

16.

The Act of Congress, approved March 3, 1903, authorizing the construction of the building provides that "a contract or contracts for its completion is hereby authorized to be

entered into subject to appropriations to be made by Congress." The contracts for the cut granite entered into under these specifications and the continuity of the work will therefore be subject to the appropriations that Congress may make from year to year, as is done with many other Government contracts.

17.

The quantity of cut granite to be furnished each fiscal year will be regulated as nearly as practicable by the Superintendent of Construction to correspond to the respective annual appropriation in justice to other parts of the work and other contractors, should any such appropriation happen to be inadequate to the full practicable progress of the year's work, otherwise the contractors shall make the progress hereinafter stipulated to be made for prompt completion.

18.

The contractor shall if required by the Superintendent of Construction, cause a valid and binding lease or leases of the quarry or quarries from which the stone is to be taken to be executed by the owner or owners of the quarries to the United States, to take effect upon the failure of the contractor to supply all the stone required by his contract to be taken from said quarry or quarries, said lease or leases to authorize the United States to take full possession of the said quarry or quarries and the entire equipments for working the same and to work the same at the expense of the contractor or contractors, in case of default. The validity of the ownership or control of quarries must be established by bidders if called upon for it.

19.

Bidders are required to return all drawings with their proposals and, if not to submit proposals, to return them immediately.

20.

Granite.

All the granite must be of a permanently bright color, evenly mixed ingredients and compact texture, tough and thoroughly suitable for fine cutting and moulding and sharp arrises.

It must be uniformly free from course specks, blotches, or streaks of any kind or color which may affect to the eye the continuity of cut lines, mouldings or surfaces. Every stone must be sound and free from flaws, seams, shakes, stains, discolored knots or streaks, or impurities that may cause future stain or discoloration.

21.

Because of the magnitude of the building, granite from several different quarries may be used to expedite the work of construction, but this will be determined upon as the kinds, shades and textures of the several granites and the respective bids for the same may appear on the opening. It is to be understood, however, that the awards of contracts will be primarily dependent upon the suitability of the different granites and the matching up of the same in the judgment of the Architects and the Superintendent of Construction in order to satisfactorily secure the following result, namely:

22.

A coarse grained granite of somewhat darker color for the Basement Story (courses HH to AA inclusive); a lighter and finer grained granite for the First and Second Stories from the top of the water table to and including the main cornice and pediments (courses A to U inclusive) and for the court walls; and a still lighter and finer grained granite for the *Attic* (courses V to Bz inclusive, to the top of the walls and dormer windows).

23.

In selecting the granites and prices it is possible that three different quarries may be drawn upon for the *Basement* walls divided as follows:

1. From A eastward around to the angle at B.

2. From angle B northward, along the whole north front and the west side of building to C.

3. From angle at C southward and eastward along the south front to angle at D.

(See the block plan No. 14.)

The first and second stories, comprised in courses A to U inclusive and including the main cornice and pediments complete will all be of one granite practically from the same quarry.

The attic or third story, comprised in courses V to Bz inclusive and including the dormers will also be of one granite and practically from one quarry.

The granite of the court walls will all be from one quarry.

24.

The proposals must therefore be in separate amounts for each of the separate sections of the building above described and as set forth in the blank form of proposal herewith. It is understood that any one or more of these proposals may be accepted independently and regardless of the others.

25.

Each proposal must be accompanied by a sample block of the granite proposed to be furnished. The sample to be 2 feet x 1 foot x about 4 inches thick and dressed 6-cut work on one flat face, jointed at edges and rough on the other face. The name of the bidder must be *cut in* the dressed face.

26.

The proposal must state the location and name of the quarry from which the sample is taken and the locations of important buildings built of the stone not less than eight years ago.

27.

As the granite for the pavilion and dome at the south front of the building is not included in the proposal and contract herein provided for and as it will have to be procured later to match the granite adopted for the first and second stories, the contractor for the last mentioned granite must agree to furnish to the United States "F. O. B." at the quarry at any time within two years after the expiration of his contract, all the granite needed from said quarry for the construction of the said pavilion and dome after the general design of the said pavilion shown in the drawing or any architectural modification thereof, at a price per cubic foot (quarry dimensions) to be stated in the proposal. The said quarry dimensions of the several rough blocks for the stones to compose the said pavilion and dome shall be the three net cubic dimensions of the dressed stone.

28.

Cutting:

All the stock must be essentially full to the lines and dimensions on the drawings. The several stones must also be such as will bond well with the brick backing of the walls.

29.

The finished dimensions, gauges, etc., of all stones must be to the United States standard measure.

30.

The grades of cutting for the several parts of the walls will be as follows, excepting as otherwise particularly specified, namely:

For the basement story and attic, as above defined, and the court walls, good four-cut work, and for the first and second stories including the main cornice and pediments all as above defined, good six-cut work. The face of the bossage (or raised faces of the ashlar fronts) in the basement, above the window sills and below the water table course, will be in course picked work.

31.

The *quality* and *character* of the several grades of cuttings and of the picked work above named that will be uniformly required of the contractor is distinctly represented in four large dressed samples of granite prepared by the United States expressly for this purpose and to be seen at the site of the building on the Mall, B street at 10th street, N. W., Washington, D. C. Bidders should carefully inspect these samples before making up their proposals.

32.

Machine dressing of the stone shall be redressed by hand if deemed necessary by the Superintendent of Construction to produce the desired hand-cut quality of work.

33.

All bush hammer cuts must be parallel and squarely across the faces of the stones as will be directed. All cutting of arrises and of all projecting mouldings, filets, etc., shall be carefully done to avoid "stunning." All bushing and pointing must be done with sharp tools.

34.

Hidden and rear faces of the work, top angles of mouldings or other projections cut on to stones and other parts of the work unseen from the fronts of the building or from any of the windows, etc., may be left more or less roughly finished

as may be specially directed, but the stock must be full to avoid holes or lumps to collect dust and water.

35.

All sills, projecting courses, platforms, copings, etc., will be cut with proper seats and washes for jambs, architraves, etc.

All moulded work will be accurately profiled, cut to dimensions and jointed as shown on the drawings and by such details and models as will be furnished to the contractor by the Superintendent of Construction.

The curved pediments will be cut from the solid and finished to the proper radius.

The entasis of the columns must be carefully cut according to the detail drawings and especially to secure exact fitting and alignment of the several drums.

The inside returns of the window jambs will be finely cut as directed at least 4 inches back from face of removal to allow for window finish.

The inside faces of all high window sills must be dressed off where necessary to clear inside furring or finish, and all thin sills must be fine joint cut at the back.

36.

No patching or mending of stones in any way whatever will be allowed excepting in rare and unimportant cases, and then only by special consent of the Superintendent of Construction in each separate case.

37.

In making up the estimate bidders will disregard the rough blocks marked "carved" in the attic story including the two pieces on top of each of the pediments, but excluding the pieces *within* the pediments, as noted in writing on the drawings. In place of these rough blocks bidders will in-

clude in their estimates the substitution of plain dressed ashlar work.

38.

Jointing:

All joints, beds and builds must be full and fine joint cut and free from large plug holes, the axe to be freely used. They must be carefully worked from true and full margin drafts. All dimensions of stones given in the drawings and schedules are the full net dimensions without allowance for thickness of joints. The contractors will therefore allow for joints as follows: For all bed joints one-quarter of an inch (¼ in.) and for all end or vertical joints three-sixteenths of an inch (3/16 in.). Particular care must be exercised in the cutting that all the joints shall be exact and uniform. All joints must be fine cut and full within three inches (3 in.) of the faces of the stones and axed full for at least three-quarters of the bed and one-half of the build and end joints, the fullness properly distributed and no deep or wide plugs holes or cavities.

39.

False jointing deeply and carefully cut for pointing with mortar may be done in certain cases where deemed proper and allowed by the Superintendent of Construction.

40.

Every stone must be cut of wind, die square, of full pattern throughout and exactly to the dimensions and shape called for by the drawings.

41.

Dove-tail lewis holes of proper depth must be accurately cut in the top bed of every stone and so located that the stone will hang level and plumb.

42.

Carving:

No carving is to be included in the contract, but the contractor will, as a rule, furnish all block required for the carving as indicated in the drawings or to be directed by the Superintendent of Construtions, properly jointed to fit into place and with rough stock enough projecting and full jointed to permit the carving to be properly done by the United States.

43.

Time:

The cut granite of the respective sections or parts of the walls above separately designated shall all be furnished and delivered within the following times after the date of notification of the approval of the contract, namely:

1. Courses HH and GG of Basement front walls complete within four months.

2. Remainder of basement story front within nine months.

3. Courses A to H of first story front complete within eight months.

4. Remainder of first and second stories front complete within one and a half years.

5. The attic or third story complete within one and a half years.

6. Course A of court walls complete within four months.

7. Courses B and C of court walls complete within nine months.

8. Remainder of court walls complete within one year.

The several courses of stone must be promptly completed and delivered for the natural order of building so that construction may proceed regularly in proper order. Payment for stones delivered much out of proper order, as may be decided by the Superintendent of Construction, will be reserved.

Payments in general will be regulated by the promptness, system and good progress made by the respective contractors in fulfilling the time schedule above laid down.

Read the General Instructions and Conditions, herewith.

ARTICLES OF AGREEMENT.

This Agreement, entered into this seventeenth day of October, nineteen hundred and four, between Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Thompson-Starrett Company (a corporation existing under the laws of the State of New York), of the second part.

Witnesseth, that, in conformity with the advertisement, specifications, instructions, and general conditions hereunto attached, which form a part of this contract, the said Bernard R. Green, and the said Thompson-Starrett Company, do covenant and agree, to and with each other, as follows:

The party of the second part shall furnish and deliver at the site of the Building for the National Museum, on the north side of the Mall opposite Tenth street, Washington, District of Columbia, from the quarries of the E. B. Ellis Granite Company, at Bethel, County of Windsor, State of Vermont, and in strict accordance with the sample of granite from said quarries submitted by the said party of the second part with their competitive proposal for this contract, all of the cut granite required for the front walls of the first and second stories, being courses A to U, both inclusive, and in-

cluding the main cornice and pediments complete, of the first and second stories of said building, and do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions, all for the gross sum of three hundred and sixty-two thousand four hundred and forty-eight and 63-100 dollars ($362,448.63).

It is further agreed by the parties hereto that the party of the second part shall, within two years from date of the completion of this contract, if required by the party of the first part, furnish for the said building, "free on board" cars at the said quarries, all of the granite of the same kind and quality as hereinbefore specified and in proper dimension blocks, required for the construction of the central pavilion and dome at the south front of the building as shown in the said drawings or any architectural modification thereof, for the price of eighty-two and one-half cents ($0.82½) per cubic foot.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the Superintendent of Construction as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 42 of the attached general conditions.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or

shall, in the judgment of the Superintendent of Construction, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Regents of the Smithsonian Institution, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract or otherwise, in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part many, in lieu of annulling the contract

under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part; provided, however, that the party of the first part may, with the prior sanction of the Regents of the Smithsonian Institution, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those

named in the original contract, and before taking effect must be approved by the Regents of the Smithsonian Institution; Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Regents of the Smithsonian Institution.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind, for, or on account of, the use of any patented invention, article

or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 41 of the general conditions hereto attached and forming part of this agreement.

12. Neither this contract or any interest therein shall be transfered to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said Thompson-Starrett Company are reserved to the United States. But this stipulation is not to be construed to extend to this contract.

13. No Member of or Delegate to Congress is or shall be admitted to any share or part of this contract or to any benefit which may arise therefrom.

14. This contract shall be subject to approval of the Regents of the Smithsonian Institution.

In witness whereof the parties aforesaid have hereunto placed their hands, the date first hereinbefore written.

Witnesses:

JOHN Q. SHEEHY, as to BERNARD R. GREEN,
Superintendent of Construction.

[Seal]

THOMPSON-STARRETT CO.,
By THEODORE STARRETT,
President.

[L. S.]

Attest:

L. J. MORTON, Treasurer.

(Executed in triplicate.)

Approved February 7, 1905, for the Regents of the Smithsonian Institution.

By S. P. LANGLEY, Secretary.

(38) That the Court erred in refusing to admit and in striking out evidence on behalf of the defendants as follows:

Q. Now, will you state whether or not Mr. Bernard R. Green did not in writing extend the time of the completion of the original contract with the Thompson-Starrett Company until June 30, 1907? A. He extended the completion of the cut stone part of the contract, not the rough stone.

Q. Until June 30, 1907? A. That was cut stone under the Thompson-Starrett contract.

The aforegoing having been objected to by the District Attorney and stricken out by the Court on said objection.

(39) That the Court erred in refusing to admit evidence on behalf of the defendants as follows:

The lease dated October 31, 1904, between the Thompson-Starrett Company and Bernard R. Green, Superintendent of Construction, of the quarry at or near Bethel, Vermont, the full substance of said rejected evidence being as follows:

This Indenture, made the 31st day of October, in the year of our Lord one thousand nine hundred and four, between the Thompson-Starrett Company, a corporation organized under the laws of the State of New York, County of New York, party of the first part, and Bernard R. Green, Superintendent of Construction of the building for the National Museum, for and on behalf of the United States of America, party of the second part,

Witnesseth:

That the said party of the first part, for and in consideration of the covenants and agreements contained in certain articles of agreement by and between the parties hereto, bearing date of October 17th, 1904, for furnishing and delivering from the quarries at Bethel, County of Windsor, State of Vermont, of all the granite required for the front walls of the first and second stories of the building for the National Museum in Washington, District of Columbia, to be kept

and performed by the party of the first part hereto, hath demised and leased and by these presents doth demise and lease to the party of the second part all those premises, together with the appurtenances thereto belonging, situate in the Town of Bethel, in the County of Windsor, State of Vermont, known and described as follows, to wit:

A certain tract of land in said Bethel, bounded as follows:

Beginning at a beech tree at the intersection of the boundary line of the premises hereby conveyed and the Chatfield farm on the east, and the southerly line of the premises hereby conveyed and the land of H. W. Davis on the south and running thence north 47 degrees east 249½ rods, along the westerly line of the Chatfield farm and the Benedict farm; thence north 42 degrees west 32 rods to a gate; thence along said gate to the end thereof; thence north along a stone wall 65½ degrees west 44 rods; thence still north along said stone wall 66 degrees west 120 rods to the end of said stone way, which stone wall separates the premises hereby conveyed from premises of Charles Waterman and land formerly owned by F. A. Stevens; thence south 71½ degrees west 128 rods, along another stone wall; thence south 89 degrees west 22 rods and 7 links; thence due north 11 rods 13 links to an apple tree with iron pin at base; thence north 54 degrees west 12 rods to an iron pin and stones; thence north 77 degrees 10 minutes west 26 rods 23 links to a yellow birch tree with an iron pin in the same; thence south 11 degrees 35 minutes west 42 rods 6 links to an iron pin; thence north 55 degrees 45 minutes west 32 rods 21 links to an iron pin and stone; thence south along the easterly line of lands now or formerly owned by E. F. Felton to an iron pin; thence south 36 degrees east 31 rods 7 links to an iron pin; thence south 51½ degrees west 8 rods 10 links to an iron pin; thence south 33½ west 16 rods 19 links to the westerly end of a stone wall separating the premises hereby leased from lands now or formerly owned by H. W. Davis; thence along said

stone wall south 56 degrees 45 minutes east 114½ rods to the point or place of beginning; the above premises being known as the L. H. Abbott farm, the Eight Acre Lot and the Bagley Lot, and being the same premises conveyed to the E. B. Ellis Granite Company by deeds from Edwin B. Ellis and Goldwin Starrett, dated December 21, 1903, recorded in Office of the Clerk of the Town of Bethel December 22, 1903, in Book 28, page 408; also deed same to same, dated December 21, 1903, recorded December 22, 1903, Book 28, 408.

Also the right of way to pass to and from the premises and the granite ledges thereon for the purpose of working and quarrying said ledges and transferring the products of said premises and said ledges from all parts of said premises and said ledges over the road as now traveled from the opening of the ledges to the road leading from the village of Bethel to said premises.

Meaning hereby to convey the parcels of land described in deeds executed by Edwin B. Ellis and Goldwin Starrett to E. B. Ellis Granite Company on the 21st day of December, 1903, recorded in the Office of the Clerk of the Town of Bethel, Windsor County, Vermont, in Registry of Deeds, Book 28, page 408, and also, during the purposes of the lease, the use of the shafts, sheds, appurtenances and lands required for procuring, preparing and shipping all of the aforesaid granite required for the first and second story front walls of the building for the National Museum.

To have and to hold the above mentioned and described premises, with the appurtenances, unto the said party of the second part, for the period of one and one-half years from and after the 17th day of October, in the year of our Lord one thousand nine hundred and four, and for and during such further time as may be necessary to procure from the said premises delivery of all the aforesaid granite required

for and to be delivered at the building for the National Museum, the full right, authority and power to enter upon or occupy and use the same or procure therefrom any and all such granite as the said party of the first part shall fail, omit or decline to furnish for the said building for the National Museum under the aforesaid articles of agreement between parties hereto.

It is expressly understood and agreed that, if the said party of the first part shall perform all and singular the covenants, stipulations and agreements contained in the aforesaid articles of agreement between the parties hereto, this lease shall be void and of no effect, but that, if the said party of the first part shall be in default in the performance of said articles of agreement, then this lease shall be of full effect and virtue.

And it is expressly understood and agreed that the aforesaid entry or occupancy of the said premises shall not be made unless the said party of the first part shall be in default in the aforesaid articles of agreement and unless the party of the second part shall give to the party of the first part eight (8) days' notice in writing of his intention to do so, and in case of said default or failure to comply with the conditions of said articles of agreement at the end of said eight (8) days, the party of the second part shall enter into full and complete possession of said premises with the appurtenances aforesaid, until the purpose of this lease, as herein declared, shall have been accomplished.

And the party of the second part further covenants with the party of the first part, that, at the expiration of the time in this lease mentioned, he will yield up said demised premises to the party of the first part.

In testimony whereof the said parties hereto have hereunto, and to a triplicate hereof, set their hands and seals the day and year first above written, the party of the first part

acting herein by Theodore Starrett, its President hereto duly authorized.

THOMPSON-STARRETT CO.,
THEODORE STARRETT, President.

[L. S.]

L. J. MORTON, Treasurer.

BERNARD R. GREEN, [Seal]
Superintendent of Construction of Building for National Museum.

Signed, sealed and delivered
in the presence of:

CHARLES M. BECKER,
as to Theodore Starrett.

JOHN Q. SHEEHY,
as to Bernard R. Green.

STATE OF NEW YORK,
County of New York, *ss*:

On the third day of November, in the year of our Lord one thousand nine hundred and four, before me personally came Theodore Starrett, to me known, who, being duly sworn, did depose and say that he resided in the Borough of Manhattan, City of New York, State of New York; that he is the president of the Thompson-Starrett Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

CHARLES M. BECKER,
[L. S.] Notary Public, N. Y. Co.

(40) That the Court erred in refusing to admit evidence on behalf of the defendants as follows:

The book of the original entry showing dimensions of all stones received by the defendant Graham from the plaintiff.

(41) That the Court erred in refusing to permit the defendant Frank F. Graham to answer under direct examination the following question:

"What was it your intention to do about this Government work?"

(42) That the Court erred in granting the following prayers and each of them offered by the plaintiff (including the plaintiff's nineteenth prayer as amended by the Court):

PLAINTIFF'S 2ND PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the first plea of either of the defendants.

PLAINTIFF'S 3RD PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the second plea of either of the defendants.

PLAINTIFF'S 4TH PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the fifth plea of either of the defendants.

PLAINTIFF'S 5TH PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the sixth plea of either of the defendants.

PLAINTIFF'S 8TH PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the ninth plea of either of the defendants.

PLAINTIFF'S 9TH PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the tenth plea of either of the defendants.

PLAINTIFF'S 10TH PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the eleventh plea of either of the defendants.

PLAINTIFF'S 13TH PRAYER.

The Court instructs the jury that there is no evidence sufficient in law to sustain the fifteenth plea of the defendant, The Title Guaranty & Surety Company.

PLAINTIFF'S 19TH PRAYER (as amended by the Court).

The plaintiff, the United States of America, prays the Court to instruct the jury that if they find for the plaintiff, the United States of America, in this case, they are to allow as damages the difference between what they may find to have been the reasonable and necessary cost to the plaintiff, the United States of America, for transporting, cutting and delivering the granite mentioned in this case at the south pavilion of the National Museum building in Washington, District of Columbia, and the amount specified in the contract offered in evidence in this case to be paid by the United States to the defendant, Frank F. Graham, for so transporting, cutting and delivering the said granite, the sum allowed, however, not to exceed the penalty of the bond sued on in this case, namely, fifty thousand dollars, with interest, in the discretion of the jury, from May 25, 1909.

(43) That the Court erred in its refusal to grant the following prayers and each of them, offered by the defendants:

DEFENDANTS' PRAYER NO. 1.

The jury are instructed that in this case the United States occupies the same position as though it were a private individual; and that it is not favored in the law applicable to this case over any such private individual.

DEFENDANTS' PRAYER NO. 2.

The jury are instructed that they are the exclusive judges under the evidence in this case as to what is meant in the contract of October 23, 1906, offered in evidence by "net dimension blocks."

DEFENDANTS' PRAYER NO. 3.

The jury are the exclusive judges as to what is meant by the words "net dimension blocks" in the specifications constituting a part of the contract of October 23, 1906; and if the jury find from the evidence in this case that large quantities of the granite mentioned in said contract were furnished to said Graham in shapes and sizes which were not "net dimension blocks," and that said shapes and sizes were materially more expensive to said Graham to freight and cut; and that said Graham on or about the eighteenth day of December, 1907, made a demand upon the Superintendent of Construction for an allowance for such additional freight and cutting on sixty-five car loads of such granite; and that said Superintendent of Construction refused to make any allowance for such additional freight and cutting; and that thereafter about one hundred further car loads of granite were furnished to said Graham; and that such car loads arrived from time to time up to March 7, 1908, or thereabouts, and that large quantities of such granite so furnished contined up to said time to be in shapes and sizes which were materially more expensive to said Graham to freight and cut; and that thereupon the said Graham on or about the said seventh day of March, 1908, ceased to cut the granite so fur-

nished; then, the jury are instructed that the said Graham was justified in so stopping said work; and that under the pleadings in this case, the verdict of the jury must be for the defendants as to the claim of the United States.

DEFENDANTS' PRAYER NO. 4.

If the jury find from the evidence that the defendant Graham at his own expense prepared full and complete sets of setting plans of the stone work referred to in the contract dated October 23, 1906, offered in evidence, showing fully every separate stone in the work, and that said plans were traced at one-quarter inch to the foot scale and were prepared, lettered and numbered as directed by the Superintendent of Construction and that said plans so prepared were delayed in submission to the said Superintendent of Construction by the acts or delays of said Superintendent of Construction or his agents, and not by the acts or defaults of said Graham, and that the granite mentioned in said contract, was not furnished to said Graham in net dimension blocks without unnecessary delay free on board cars at the quarry at Bethel, Vermont, and that said failure on the part of said Superintendent of Construction so to furnish said granite in net dimension blocks without unnecessary delay free on board cars at said quarry resulted in large expenses and losses to said Graham, and that payments were not made to said Graham from time to time as the progress of the work warranted less a percentage of ten per centum reserved from each payment; and that in the winter of 1907 and 1908, after October 1, 1907, the United States delivered and continued to deliver to the defendant Graham quantities of granite, and that said granite was not in net dimension blocks and was in excess of such amount as said Graham could reasonably be expected to cut at that season of the year; and that thereupon in the month of March, 1908, said Graham ceased to cut the granite referred to in said contract;

then, their verdict should be for the defendants; and the jury are further instructed in this connection that they are the exclusive judges under the evidence in this case as to what is meant in the contract of October 23, 1906, and the specifications constituting a part thereof, by "net dimension blocks."

DEFENDANTS' PRAYER NO. 5.

If the jury find from the evidence that the granite mentioned in the contract of October the twenty-third, 1906, offered in evidence, was not furnished to the defendant Graham without unnecessary delay, and that less than eleven thousand cubic feet thereof were furnished to said Graham before October 1, 1907; and that said Graham had lost large sums in waiting for granite to be furnished prior to October 1, 1907; and that between the said first day of October, 1907, and the seventh day of March, 1908, a granite supply was furnished largely in excess of the amount which said Graham could reasonably have been expected to handle and cut at that season; and that the excess of the supply received over the amount which said Graham could reasonably have been expected to cut at said season became and was massed in said Graham's yards in Baltimore in such amounts as to make it impracticable to work profitably in said yards; and that said Graham thereupon ceased to work on said granite; then, the jury are instructed that said Graham was justified in so doing; and that under the pleadings in this case, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 6.

That according to the true construction of the contract of October 23, 1906, and the specifications constituting a part thereof, the defendant Graham was obliged to furnish setting plans, prepared, lettered and numbered as may be directed by the Superintendent of Construction, and said Graham was

obliged to submit such setting plans to said Superintendent of Construction not less than one month prior to the commencement by said Graham of the work on the cutting of the stones represented in such setting plans; and the said contract and specifications do not provide for the furnishing of setting plans or copies thereof to the Quarry at or near Bethel, Vermont.

DEFENDANTS' PRAYER NO. 7.

That the receipts given by the defendant Graham from time to time for amounts received from the Superintendent of Construction on progress payments are not conclusive evidence of the respective amounts due at the time of such payments; and the jury are to judge from all the evidence whether such payments were all that the progress of the work fairly and reasonably warranted at the time of such payments.

DEFENDANTS' PRAYER NO. 8.

The general instructions and conditions, constituting a part of the contract of October 23, 1906, offered in evidence, provide:

"Payments will be made from time to time as the progress of the work may warrant. A percentage of ten *per centum* will be reserved from each payment until the whole of the cut granite called for by the annexed contract shall have been satisfactorily delivered and accepted;" and the jury are instructed that under this provision, the defendant Graham was entitled to ninety per cent. of such payments from time to time as the progress of the work fairly and reasonably warranted; and the jury are the exclusive judges under all the evidence in this case as to what payments the progress of the work from time to time did fairly and reasonably warrant.

DEFENDANTS' PRAYER NO. 9.

In no event can the United States charge against the contract of October 23, 1906, more than the fair and reasonable value of completing the work mentioned in said contract; and the jury are the exclusive judges as to what is fair and reasonable under the evidence in this case; and if the jury find from the evidence that the fair and reasonable value of the completion of the work mentioned in said contract, should not have exceeded the contract price of one hundred and forty-nine thousand dollars ($149,000) less the sum of fifty-nine thousand four hundred dollars ($59,400) paid to said Graham; then, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 10.

No evidence has been offered legally sufficient to prove the fair and reasonable cost of completing the work mentioned in the contract of October 23, 1906, offered in evidence, in excess of the price in said contract stipulated to be paid to the defendant Graham for the completion of said contract; and the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 11.

That according to the undisputed evidence in this case, the United States has blended and failed to segregate the cost of the completion of the work under contract of October 23, 1906, and the cost of completion of the work under the unexecuted supplemental contract dated March 6, 1908, offered in evidence; and under the pleadings in this case, the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 11½.

If the jury find from the evidence that the Superintendent of Construction did not act in good faith in annulling the contract offered in evidence; then, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 12.

If the jury shall find from the evidence that on the eighteenth day of March, 1908, the Superintendent of Construction, Bernard R. Green, knew that large quantities of the granite stone referred to in the contract of October 23, 1906, had not been furnished to the defendant Frank F. Graham, without unnecessary delay, and that only about eleven thousand cubic feet of the said granite had been furnished to said defendant on or before October 1, 1907, and that subsequently during the months of December, 1907, January, 1908, and February, 1908, great quantities of said granite had been shipped by the agents and servants of said Superintendent of Construction to the said Graham; and that such shipments on account of the season of the year could not be handled and cut by the said Graham without great additional expense, and that on account of said large shipments the stone-cutting yard of the said Graham had been so overcrowded that the work of cutting stone at that period of the year could not be profitably carried on by the said Graham, and that said Graham was suffering and would suffer serious financial losses on account of said overcrowding; and shall further find from the evidence that the said Superintendent of Construction knew that large quantities of said granite so furnished by his agents were not in net dimension blocks; and that on account of the sizes and shapes of said blocks, said Graham was and would be obliged to pay considerable sums of money for the freight on the additional stone in said blocks, and for the additional cost of cutting said stone; and shall further find from the evidence that the said Graham, through his attorney, informed the said Superintendent of Construction on or about March 15, 1908, that he had stopped work on the granite work of the south pavilion on account of the damage which, he, Graham, had suffered by reason of the manner in which this matter had been gone on with on the part of the United States and its agents, and that

he was ready to amicably adjust the matter on a fair and equitable basis between the parties; and shall further find from the evidence that said Superintendent of Construction told the Secretary of the Smithsonian Institution at or about the time at which he requested the said Secretary to sanction the annulment of said contract that the said Graham had thrown up his contract; then the jury are instructed that the said Superintendent of Construction did not act in good faith in seeking to annul said contract with the sanction of the said Secretary as representing the Regents of the Smithsonian Institution on March 18, 1908; and that under the pleadings, their verdict must be for the defendants.

DEFENDANTS' PRAYER NO. 13.

That according to the undisputed evidence, the work mentioned in the contract of October 23, 1906, was materially altered in that it was completed according to the following supplemental contract:

"SUPPLEMENTAL CONTRACT,

Made and concluded this sixth day of March, nineteen hundred and eight, by and between Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, State of Maryland, of the second part:

Witnesseth, that whereas, a contract has heretofore been entered into between the parties hereto on the twenty-third day of October, nineteen hundred and six, for transportation from quarry, cutting, furnishing, and delivering at the site of the new building for the National Museum, in Washington, District of Columbia, the cut granite required for the south pavilion above the first floor level of the said building, for the gross sum of one hundred forty-nine thousand dollars

($149,000.00), and whereas, by reason of changes found desirable in the details of the design of the said cut granite by which the diameter of the drum of the dome is increased from 80 feet to 84 feet, the breadth of the column and pilaster caps increased to suit the sculptor's models, certain cornice courses increased in depth for greater stability of the wall, and panel stones of granite inserted in the U course, the said party of the first part has agreed and by these presents does agree, with the said party of the second part, for himself, his heirs, executors, and administrators, for and in consideration of the said changes to pay to the party of the second part the sum of four thousand dollars ($4,000.00) additional to the consideration in the said contract of October 23, 1906, increasing the sum total of the said contract to one hundred and fifty-three thousand dollars ($153,000.00).

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

_____

Superintendent of Construction.

_____, [Seal]

Witnesses:

_____,

_____.

(Executed in triplicate.)

The Title Guaranty & Surety Co., of Scranton, Pa., the surety on the bond attached to the contract of October 23, 1906, between Bernard R. Green, Superintendent of Construction, and Frank F. Graham, for furnishing and delivering cut granite for the south pavilion of the building for the National Museum, which bond is dated the twenty-sixth day of October, 1906, does hereby consent to the change in said contract above named, and does hereby agree that said change shall not affect its liability on said bond in any manner whatever.

In witness whereof, the said The Title Guaranty & Surety Co., of Scranton, Pa., has placed its hand and caused its seal to be attached hereto this day of March, nineteen hundred and eight.

Approved , 1908, for the Regents of the Smithsonian Institution.

By ————, Secretary."

And that said contract was never executed; and that the changes mentioned therein were never assented to by The Title Guaranty & Surety Company; and the verdict of the jury, under the pleadings in this case, must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 14.

That according to the undisputed evidence in this case, the work under the contract of October 23, 1906, was materially altered; and under the pleadings in this case, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 15.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the plaintiff to recover; and the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 16.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the United States to recover against either of the defendants; and the verdict of the jury must, therefore, be for said defendants.

DEFENDANTS' PRAYER NO. 17.

No evidence has been offered legally sufficient to prove that the Superintendent of Construction annulled the contract offered in evidence, with the sanction of the Regents

of the Smithsonian Institution; and the verdict of the jury must, therefore, under the pleadings in this case, be for The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 18.

That according to the undisputed evidence, the work mentioned in the contract of October 23, 1906, was materially altered in that it was completed according to the following supplemental contract:

"SUPPLEMENTAL CONTRACT,

Made and concluded this sixth day of March, nineteen hundred and eight, by and between Bernard R. Green, Superintendent of Construction, of the first part, acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America, and Frank F. Graham, of Baltimore, in the County of Baltimore, State of Maryland, of the second part:

Witnesseth, that whereas, a contract has heretofore been entered into between the parties hereto on the twenty-third day of October, nineteen hundred and six, for transporting from quarry, cutting, furnishing, and delivering at the site of the new building for the National Museum, in Washington, District of Columbia, the cut granite required for the south pavilion above the first floor level of the said building, for the gross sum of one hundred forty-nine thousand dollars ($149,000.00), and whereas, by reason of changes found desirable in the details of the design of the said cut granite by which the diameter of the drum of the dome is increased from 80 feet to 84 feet, the breadth of the column and pilaster caps increased to suit the sculptor's models, certain cornice courses increased in depth for greater stability of the wall, and panel stones of granite inserted in the U course, the said party of the first part has agreed and by these presents does

agree, with the said party of the second part, for himself, his heirs, executors, and administrators, for and in consideration of the said changes, to pay to the party of the second part the sum of four thousand dollars ($4,000.00) additional to the consideration in the said contract of October 23, 1906, increasing the sum total of the said contract to one hundred and fifty-three thousand dollars ($153,000.00).

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

_____,
Superintendent of Construction.

_____, [Seal]

Witnesses:

_____,

_____,

(Executed in triplicate.)

The Title Guaranty & Surety Co., of Scranton, Pa., the surety on the bond attached to the contract of October 23, 1906, between Bernard R. Green, Superintendent of Construction, and Frank F. Graham, for furnishing and delivering cut granite for the south pavilion of the building for the National Museum, which bond is dated the twenty-sixth day of October, 1906, does hereby consent to the change in said contract above named, and does hereby agree that said change shall not affect its liability on said bond in any manner whatever.

In witness whereof, the said The Title Guaranty & Surety Co., of Scranton, Pa., has placed its hand and caused its seal to be attached hereto this day of March, nineteen hundred and eight.

Approved , 1908, for the Regents of the Smithsonian Institution.

By _____, Secretary."

And that said contract was never executed; and that the changes mentioned therein were never assented to by The Title Guaranty & Surety Company; and the verdict of the jury, under the pleadings in this case, must, therefore, be for the said The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 19.

Under the pleadings in this case, no evidence has been offered legally sufficient to entitle the United States to recover against The Title Guaranty & Surety Company; and the verdict of the jury must, therefore, be for the said defendant.

DEFENDANTS' PRAYER NO. 20.

No evidence has been offered legally sufficient to prove that the Superintendent of Construction annulled the contract, offered in evidence, with the sanction of the Regents of the Smithsonian Institution; and under the pleadings in this case, the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 21.

That according to the undisputed evidence in this case, the work under the contract of October 23, 1906, offered in evidence, was so materially altered, without the assent of the surety, as to relieve the said surety on the bond from liability; and the verdict of the jury, must, therefore, be for The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 22.

That if the jury find from the evidence that the acts of the United States and the Thompson-Starrett Company prevented the defendant Graham from freighting, cutting, boxing and delivering complete to the United States all of the

Bethel granite required for part "C" of the pavilion, mentioned in the contract and specifications offered in evidence, before October 1, 1907; and that the United States without taking any further action in the premises under said contract, and after knowing the work under said contract was not completed before October 1, 1907, and without notice to The Title Guaranty & Surety Company, through its Superintendent of Construction, permitted said Graham to proceed on said work till March, 1908, and that the United States accepted said work from October 1, 1907, to March, 1908; then their verdict must be for The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 23.

That if the jury find from the evidence that there was unnecessary and unreasonable delay on the part of the United States in delivering granite stock to the defendant Graham free on board the cars at the quarry at or near Bethel, Vermont, and that said delay alone rendered it impossible for the said Graham to complete his contract by October 1, 1907; and that The Title Guaranty & Surety Company was not notified by the United States of such delay at any time before October 1, 1907; then, the verdict of the jury must be for The Title Guaranty & Surety Company.

DEFENDANTS' PRAYER NO. 24.

That if the jury find from the evidence that a substantial portion of the necessary granite stock was not furnished to the defendant Graham in net dimension blocks free on board cars at the quarry at or near Bethel, Vermont, and that the said Graham was without fault in the premises; then, the verdict of the jury must be for the defendants.

DEFENDANTS' PRAYER NO. 25.

No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case; and the verdict of the jury must, therefore, be for the defendants.

DEFENDANTS' PRAYER NO. 26.

No evidence has been offered legally sufficient to entitle the plaintiff to recover in this case against The Title Guaranty & Surety Company; and the verdict of the jury must, therefore, be for the said defendant.

(44) That the Court erred in using in its charge to the jury the language set forth in the following eighteen paragraphs and each of them:

First Paragraph.

"There obviously must be some excess of sizes, in order that the stone cutter can dress down the stone to the exact size and shape required to produce the surface on the stone called for."

Second Paragraph.

"That dimension blocks are those furnished by the quarry in sizes and dimensions from which the stone cutter can produce the desired stone of the dimension required by the setting plan."

Third Paragraph.

"What was understood by the parties to this contract to be meant by net dimension blocks is for you to determine from the weight of all the evidence which you have heard."

Fourth Paragraph.

"You must try to determine what was the meaning in this contract and if you can, you should reconcile this wide difference between the witnesses."

Fifth Paragraph.

"Mr. Graham has said, I think you will recall, that it was not expected that the blocks described as net dimension should

be either sawed or cut before he received them, but might run 2 or 3 inches in excess of the dressed stone and that the rough stone should not average more than 225 pounds to the cubic foot of dressed measurement and should be often something less."

Sixth Paragraph.

"Now, it is for you to say whether on a fair average the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulation was understood by the parties to the contract."

Seventh Paragraph.

"If you find that the stone furnished from the quarry was on a fair average, such as the contract as so understood called for, then Graham could not rightfully, on account of the sizes of the stone, abandon his contract."

Eighth Paragraph.

"On February 10, 1908, Mr. Graham wrote to Mr. Green that he intended to devote his yard to the contract, the payments to be made to him as previously which tends to show that up to that time although there had been complaints of the roughness of the stone, it may have been on the whole average such as would gratify the contract."

Ninth Paragraph.

"It is generally important to find out with regard to such a contract what interpretation the parties themselves put upon it when working under it. How they by their acts show that they understood it."

Tenth Paragraph.

"And the Government has the right to require from Graham rightful compliance with his contract whether profitable to him or not and to require that the surety shall answer under its bond for his defaults."

Eleventh Paragraph.

"For that possibly may be the very reason why Graham failed to complete it."

Twelfth Paragraph.

"But the proof is that, in point of fact, Graham did stop work, discharged his men and told them to look for other employment, and he did not intend to go on with the work until he got some terms from the Government, the terms of which we do not know.

Thirteenth Paragraph.

"It was said and there was no proof to the contrary, that the practice is to leave all matters of detail and matters such as this to the Secretary of the Institution. For a long time they have allowed him to exercise those powers."

Fourteenth Paragraph.

"Mr. Green stated that in his judgment the contract should be annulled because of the failure of the defendant, and therefore the annulment was made. I can see no ground for saying to the jury that the contract was not annulled."

Fifteenth Paragraph.

"The Secretary, acting for the Regents, gave his consent to the annulment in the proper manner."

Sixteenth Paragraph.

"There is no evidence in my judgment to show that the annulment was the result of any bad faith on the part of Mr.

Green. Mr. Green has acted within his rights, and as the agent of the Government, it was his duty to protect the interests of the Government. I do not think that he has gone beyond the limits of his power."

Seventeenth Paragraph.

"If the stone was ready for delivery on board the cars in advance of the cars being furnished to receive it and if the Government, by its agents, made all reasonable efforts to see that cars were furnished, then the defendant Graham was not justified in abandoning his contract, even though the cars came irregularly and not promptly."

Eighteenth Paragraph.

"The Government, by its contract, did not bind itself to furnish transportation for the stone it was to be delivered to Graham at Bethel at the quarry and was after that at his risk and cost of transportation until delivered by him at the government grounds at Washington."

(45) That the Court erred in using in its subsequent instructions to the jury during the argument of counsel for the defendants (Mr. Harley), who was interrupted for that purpose, the language embraced in the following six paragraphs and each of them:

First Paragraph.

"I have said more than once it was not the duty of the Government to furnish the cars. I have said that I thought it was the duty of the Government to co-operate with the parties who were shipping the stone in a reasonable manner, in order to facilitate the shipment. The furnishing of the cars was at the risk of Graham. I do not see that that letter throws any light on the furnishing of the cars." (Referring

to the letter of February 8, 1908, from Bernard R. Green, Superintendent of Construction, to Thompson-Starrett Company.)

Second Paragraph.

"In a contract of that kind, I think there was an obligation on both parties to furnish cars—that reasonable efforts should be made to accommodate each other."

Third Paragraph.

"I say to you and to the jury that there is no evidence of delay, because the cars were not furnished. It was not the duty of the Government to furnish the cars."

Fourth Paragraph.

"I have said that the question of delay should be ruled out of th case. Graham never raised the question of delay. They never charged him with default because it was not delivered up to the time."

Fifth Paragraph.

"I do not think there is evidence upon which the jury would be allowed to say that Graham was justified in abandoning the contract on account of delay in the delivery of the stone. I do not think that can be shown. You may argue upon the fact of the difficulties of proceeding with the contract, because of the excessive weight of the stone and the way in which it was delivered at the quarry. That may be dwelt upon; but as a distinct issue, that the jury may find against the Government, because the stone was not delivered in time, I have said there was no sufficient evidence."

Sixth Paragraph.

"I ought not to let the jury find against the Government now, because of delay in furnishing the stone, because there

never was an issue distinctly raised. Graham said 'I am going on now. I am going to devote my whole yard to the performance of the contract.' That letter which Graham writes urging upon the quarryman to furnish the stone, I do not understand that that means they made no efforts."

(46) That the Court erred in permitting the United States' Attorney for the District of Maryland (Mr. Hill) during his closing argument before the jury, to read, over and against the objections of the defendants, from the letter head of a certain letter which was in evidence, as will more fully appear from assignments of errors Nos. 14, 15 and 17, the words following:

"Fidelity Judicial. We issue surety bonds. Contract Official. The Title Guaranty & Surety Company. Home Office: Scranton, Penna. Capital and surplus over $1,000,000.00," and to say immediately thereafter *"There is no room for sympathy for the poor defendant in this case."*

(47) That the Court erred in entering judgment against the plaintiffs in error.

BRIEF OF ARGUMENT.

This is not a case in which the contract and bond were prepared by the surety. All the papers were drawn by the Superintendent of Construction. (Record, 254.)

Although the bond sued on and the contract were executed in Washington, D. C., matters respecting the remedy and the admissibility of the evidence depend upon the *lex fori* (Maryland).

Scudder vs. Union Bank, 91 U. S. 406.

As the errors assigned are numerous, we may hope best to assist the court by grouping them in our argument.

Misleading Prayers.

We submit that the plaintiff's second, third, fourth, fifth, eighth, ninth, tenth and thirteenth granted prayers, and each of them, are fatally misleading and confusing in form. They appear in the 36th bill of exceptions and the 42nd assignment of errors. (Record, 854, 903, 904.)

The second prayer is as follows: "The court instructs the jury that there is no evidence sufficient in law to sustain the first plea of either of the defendants." The others differ only in their application to other pleas.

What was intended to be the subject matter of some of these prayers, thus hopelessly obscured from the jury, is not referred to again in any instruction of any kind or character.

We have not been able to find a reported case in which a prayer of this kind has been granted. What do jurors know about *pleas* or any other formal legal matter? What could this jury have possibly understood by these prayers, particularly in the face of the fact that not a single prayer offered by the defendants was granted?

The Court intended to submit to the jury in the whole case the finding of only a narrow margin of fact; and these successive prayers of the plaintiff, which the jury could not possibly understand, operated virtually as an instruction to find for the plaintiff, and thus rid themselves of difficulties as to pleas which they never understood and, indeed, never saw. The practice in the Court below conforms to the local practice.

Sec. 914, U. S. R. S.

In Baltimore City, the practice is to give to the jury the declaration only, and the Court's instructions.

2 Poe's Practice 351.

The Federal Courts conform to this practice; and the *jury never saw the pleas*; and the pleas were not explained to the jury. The instructions are all in the record.

Besides, "the issues to be tried are supposed to be fully explained to the jury at the bar, in the course of the trial; and, therefore, the jury are not left to grope through the technical verbiage of pleading to ascertain for themselves what issues they are required to determine."

Alvey, C. J., in Hitchens vs. Frostburg, 68 Md. 117;

See also—

Hughes on Instructions, sec. 53.

"It is not always easy for the Court itself to understand the pleadings; and certainly it would be too much to expect that the jury would not misunderstand them."

Sec. 214, Sackett on Instructions;
11 Ency. Pl. & Pr. 154.

"The purpose of instruction is to inform the jury clearly and pointedly as to the law of the case so as to leave no reasonable ground of misapprehension or mistake."

Adams vs. Somerset Co., 106 Md. 201.

This is good Federal, as well as State, law. How could these instructions result in anything but confusion and error, when the jury never even saw the technical pleas to which the prayers referred?

Million Dollar Argument.

Emphasizing either in evidence or argument the fact that one of the defendants is a million dollar concern can hardly contribute to the enlightenment of the jury in any case *ex contractu;* and the objection is all the stronger when the offending party is the Government for which each individual juror has the highest patriotism and enthusiasm.

Yet, in this case, the attorney for the United States, over and against the objection of the defendants, was permitted to

read and emphasize the printed letterhead of the surety as follows: "Fidelity-Judicial. We issue surety bonds. Contract—official. The Title Guaranty & Surety Company. Home Office: Scranton, Pa. Capital and surplus over $1,000,000.00 (in red ink). Philip Walker, Attorney. George T. Parker Company, General Agent, 201-227 Colorado Building. 'Phone, Main 3491. Worthington, Heald & Frailey, Local Counsel. Washington, D. C."

This constitutes the subject of the eighth bill of exceptions (Record, 126) and the fourteenth assignment of errors. It was then twice repeated and further emphasized as will more fully appear in the ninth and eleventh bills of exceptions (Record, 129, 132, 880 and 882) and the fifteenth and seventeenth assignments of errors. Not content with directing the witness to "read the whole of it, including the printed heading at the top of the letter, both in black and red ink, as you did the prior letter," counsel for the United States during his closing argument to the jury, when we had no opportunity even to reply, over and against our objection, read from a letter head this same language to the jury, and said immediately thereafter, "There is no room for sympathy for the poor defendant in this case;" and in this action he had the support of the Court. See 39th bill of exceptions and 46th assignment of errors. (Record, 874, 875, 919.)

Is this evidence, this argument calculated merely to stimulate a jury to the fair discharge of a duty? Or is its purpose to prejudice them in favor of our government as against a million dollar corporation? Did it not have a "reasonable tendency to interfere with a fair decision of the case on its merits?"

It is difficult for a person, natural or artificial, to secure a fair trial in a case of this kind against the United States; and the line against evidence and argument (?) of this character should be fairly and firmly drawn.

In Waldron vs. Waldron, 156 U. S. 361 (The Honorable Chief Justice), a new trial was granted because counsel misused in his argument testimony which had been admitted without objection. Here the million dollar evidence against our objection is thrice introduced, although entirely irrelevant; and then this evidence is misused in the argument.

In actions *ex contractu*, "the wealth of the defendant can have no possible bearing, and evidence thereof should not be received."

Southern R. R. Co. vs. Bryant, 105 Ga. 316;
4 Ency. of Evidence, 27;
Sun Life Co. vs. Bailey (Va.), 44 S. E. R. 692, 695;
Bennett vs. Beam, 42 Mich. 346, 350.

See also as to the effect of this testimony on the co-defendant, Chicago City Ry. Co. vs. Henry, 62 Ills., 142, 145, 146.

The admission of this evidence was wrong in the first place, and permitting it to be unnecessarily admitted and emphasized on three different consecutive occasions, only accentuates the error, and shows that it could not have been offered for any legitimate purpose.

What was the object of counsel for the United States in reading this same printed letter-head to the jury and in saying immediately thereafter to them: "There is no room for sympathy for the poor defendant in this case?"

Could he have had any fair purpose? Could he expect from that evidence and that argument (?) fair results?

In the case of a similar argument(?), the Court said:

> "The conduct of counsel was manifestly improper and prejudicial to the rights of the defendant. There is enough natural and inherent prejudice in the minds of jurors against railroads and other corporations without having it augmented by direct and improper appeals

calculated to arouse the sympathy, passion and prejudice of jurors."

Ill. Cent. Ry. Co. vs. Seitz, 111 Ill. App. 242, 243.

In reference to remarks of counsel about "this large corporation," not nearly so drastic and damaging, another Court said in reversing the judgment:

"While we can not say that included in these excepted statements there is not an argument that is just and legitimate, we can not fail to see that, mingled with it, is an improper appeal that the jury should take into consideration, in determining this case the fact that the plaintiff is an individual and the defendant a corporation. The principles of justice, as well as our own decisions (citing many of them) compel us to condemn this argument."

Johnson vs. Detroit Ry. Co., 135 Mich. 353, 360;

See also—

Hillman vs. Detroit United Ry., 137 Mich 184;
B. & O. vs. Boyd, 67 Md. 32, 42;
5 Am. & Eng. Ency of Law & Prac. 346;
West Chicago St. R. Co. vs. Musa, 80 Ill. App. 223;
White vs. Chicago & N. W. Ry., 124 N. W. 309;
Southwestern Telegraph & Telephone Co. vs Taylor, 118 S. W. 188;
Ft. Worth Belt Ry. Co. vs. Johnson 125 S. W. 387;
U. S. Cement Co. vs. Cooper, 88 N. E. 69;
Lane vs. State, 85 Alabama, 11;
Sullivan vs. Chicago R. I. & Pac. Ry., 119 Iowa, 464;

Bjoraker vs. Chicago, Milwaukee & St. Paul Ry. Co., 103 Minn. 400 (and a large number of authorities there cited);
Dallas Cons. Elec. St. Ry. Co. vs. Black, 40 Texas Civil App. 415; 89 S. W. 1087;
Louisville & N. R. Co. vs. Crow (Kentucky), 107 S. W. 807;
5 A. & E. Ency. of Law & Practice, 365;
Ill. Central Ry. Co. vs. Proctor, 122 Ky. 92.

"It is the duty of the Court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, or irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by Court or counsel to discharge this duty, or a persistent violation of it, is a fatal error, because it makes the trial unfair." "It is exceedingly difficult to withdraw from the minds of jurors, or from any mind, suggestions of immaterial facts; and yet, in cases in which the address of counsel conveys suggestions of this nature to the minds of the triers of the facts, it is only when it is certain that these have been withdrawn that the trial is fair and impartial." "It is therefore, of the gravest importance that the conveyance of such suggestions to their minds should be prevented at the very threshold of the attempt, and that court and counsel should guard the jury with zealous care against all illegal, improper or unfair arguments or suggestions. Waldron vs. Waldron, 156 U. S. 361, 367, 383, 384; Graves vs. U. S., 150 U. S. 118, 120; Hall vs. U. S., 150 U. S. 76; Wilson vs. U. S., 149 U. S. 60, 68; St. Louis & S. F. Ry. Co. vs. Farr, 6 C. C. A. 211, 216, 217; 56 Fed. 994, 1000; St. Louis & S. F. Ry. Co. vs. Bennett, 16 C. C.

A. 300, 305; 69 Fed. 525, 529, 530; Cudahay Packing Co. vs. Skoumal, 60 C. C. A. 306, 313; 125 Fed. 470, 477; Bullard vs. Boston & M. R. Co., 64 N. H. 27; 5 Atl. 838, 840; 10 Am. St. Rp. 367; Perkins vs. Burley, 64 N. H. 524; 15 Atl. 21; Magoon vs. Boston and M. R. Co. (Vt.), 31 Atl. 156, 163; State vs. Hannett, 54 Vt. 83, 89; Brown vs. Swineford, 44 Wisc. 282, 294; 28 Am. Rep. 582; Mitchum vs. State of Ga., 11 Ga. 615. The presumption always is that the error produces prejudice."

Union Pac. R. Co. vs. Field, 137 Fed. Rep. 14.

"If courts are to continue to be places where justice is judicially administered, causes must be fairly presented and fairly defended, and the duty of counsel in this regard is not less important nor less imperative than that of the judge. A cause is not well tried, unless fairly tried."

Saxton vs. Pittsburg Ry. Co., 219 Pa. 492.

What was our brother's purpose in offering this heading "both in black and *red* ink," in evidence? (Record, 126.)

What was his purpose in offering it again, "both in black and red ink?" (Record, 129.)

What was his purpose in offering and emphasizing it a third time? (Record, 131 and 132.)

What was his purpose in reading it to the jury in his closing argument and then saying to the jury, "There is no room for sympathy for the poor defendant in this case?" (Record, 875.)

Was it fair, relevant and lawful?

The brief of the District Attorney in the Circuit Court of Appeals contained the following statement:

"Since the Government is not the party taking the appeal in this case, nothing appears in the record as to

the arguments made by the counsel for the plaintiffs in error to the jury, and there is, therefore, no official way of bringing before the attention of the Honorable Judges of the Circuit Court of Appeals the course which these arguments took. It may be perfectly safe, however, for the Circuit Court of Appeals to presume in a case such as the present one, where it is shown by the evidence that one of the plaintiffs in error is apparently a poor man, that the efforts of the counsel on behalf of the plaintiffs in error, the defendants below would be to put the Title Guaranty & Surety Company as much in the background as possible and have it only appear that this suit was against Mr. Graham. In fact, although this is outside of the record, counsel for the defendant in error can recall but one or two references during the whole arguments of the counsel for the plaintiffs in error to the Title Guaranty & Surety Company, while indirect appeals were made of various kinds and at various stages of the trial to the natural sympathy of the jury for the 'poor defendant,' Mr. Graham.

"It was in answer to such arguments as these that the counsel for the defendant in error used the language, 'There is no room for sympathy for the poor defendant in this case.'"

There is only one way to answer this: In the first place it is not true; in the second place, it does not appear in the record; in the third place, if this unfair argument had been an answer to arguments similarly unfair, there would have been no difficulty about incorporating that fact in the record.

Court's Remarks.

Under this heading, we will group the 24th, 28th, 31st and 32nd assignments of errors (Record, 884, 885). They constitute respectively the 18th, 22nd, 25th and 26th bills

of exceptions (Record, 337, 362, 486 and 487). There is nothing which will so much prejudice a case as the remarks of the Court throughout the progress of the case; and this is particularly true of the Federal Courts, with their great dignity and weight. We submit, with the greatest respect for the memory of the distinguished and lovable judge who heard this case, that he fell into this error.

At page 336, Record, an effort was made to ascertain from the Superintendent, who ought to have had some record of the matter, a very important fact in this case: "Do you know how many cubic feet of stone you cut yourself on the Graham job?" The government was charging nearly $150,000 for cutting stone; it was important to find out how many feet it had cut. It afterwards developed that the government never made a complete calculation of the number of feet in the contract. Mr. Pirie made an *estimate* for which he did not claim accuracy. (Record, 488.) Mr. Sheehy never made the calculations. (Record, 854.) Mr. Freas included some things which he should have omitted, and omitted a part of the contract. (Record, 546.)

We repeat that this information was important; and we submit that we requested it in a proper and respectful manner. Please look at the Record (page 337) and see whether the Court's remarks were justifiable.

Then again, the Court's remarks (at page 362) were such that the jury could draw only an unfair inference from them. Are they not an unjust reflection, from the very highest source, upon the promptness with which we had cut the granite mentioned in this case?

In the course of the examination of Mr. Pirie, one of the most important witnesses for the United States, he twice stated that a certain book, placed in evidence and kept by him, included all the stones in the Graham contract (Record, 486).

The amount of stone cut by Graham and the United States respectively, was a very important part of the controversy.

After careful cross-examination, we discovered a shortage in Pirie's book of 155 stones, weighing many tons. All these stones were cut by Graham. When we had worked on the matter and brought it to the attention of the jury, the Court voluntarily interposed: "I can not see why you emphasize that of being of such supreme importance." Counsel excepted very respectfully, whereupon the Court again expressed and emphasized its view: "I think you are rather violent with the witness, and I can not see that it is of such supreme importance." (Record, 486 and 487.)

Not only had we shown that Pirie's book, which was a most important part of the Government's evidence, was short 155 stones (Record, 485 and 486), weighing many tons; but it subsequently developed, after research on his part for several days, he was still short 26 stones in his supplemental memoranda. (Record, 661.)

The effect of the testimony was, we submit, destroyed by the Court's remarks. Its importance *vel non* was not "ultimately submitted to the determination of the jury."

Vicksburg Co. vs. Putnam, 118 U. S. 545; and authorities therein cited.

"Evidence should be admitted, if at all, without comment from the judge calculated to increase or decrease its weight with the jury."

Frieberg et al. vs. B. H. & S. I. Co., 63 Texas, 449, 455;

See also—

Deshler vs. Beers, 32 Ills. 368.

"Judges must take great care to say nothing in the hearing of jurors while a case is progressing which can possibly be construed to the prejudice of either party."

Cromplaite vs. Dickerson, 16 N. W. R. 371; 51 Mich. 177.

As to the prejudicial effect of Court's remarks, see—

Williams vs. City, 119 Mich. 395;
Hudson vs. Hudson, 90 Ga. 581;
West vs. Black, 65 Ga. 647;
Knox vs. Fuller, 62 Pac. Rep. 131, 135;
Kane vs. Kinnare, 69 Ill. App. 81.

Judge Cooley, in Wheeler vs. Wallace (53 Mich. 355), said:

> "Error will lie on the demeanor of the trial judge, if it be such as to prevent a fair trial or prejudice the case upon the facts before the jury. It is very unusual to have exception taken on writ of error to the manner and deportment of the trial judge in the conduct of the trial, and under ordinary circumstances a court of review would not scrutinize very closely his methods where no error in his rulings was alleged. Still, it is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition to the jury of his own opinions in respect to the parties, or to their case; and when it is apparent that a fair trial has not been had, a court of review should give relief as soon for that cause as for any other. The fact that the duty to do so is unusual or unpleasant, is no reason for declining it.
>
> "In this case, we are satisfied the plaintiff has not had a fair trial. In saying this it is not necessary to impute to the judge any purpose to be a partisan in the case, or otherwise unfair. It is not likely he intended to try the case with less than his customary urbanity and courtesy."

We simply ask the Court to examine the errors assigned on this point.

Now, here is a judge, distinguished for his urbane and lovable qualities during the many years he graced the bench. In affection for the man,—in respect for the judge,—we yield to none. But the hot weather and the long trial and the state of his Honor's health merely brought out the fact that he was only human. We knew him too long and too well to feel any hesitancy in submitting these points respectfully to the consideration of this Court, without disturbing the sweetest memories that come to us from the life of this great man.

Cost.

The 30th, 33rd, 34th, 35th and 36th assignments of errors and the plaintiff's 19th prayer, as amended, and the defendants' 9th, 10th and 11th prayers deal with the question of damages.

The method of proof objected to in the foregoing assignment of errors is too much *en masse* to gratify the plain requirements of the law as to damages. (Record, 885, 886.)

The Superintendent certified that the amount of the contract ($149,000) was *reasonable*. (Record, 72.)

Graham testified that the contract should have been very profitable. (Record, 799.)

Mr. Graham cut 27,507 cubic feet (Record, 469). He received $59,400. The Government cut 31,861 cubic feet (Record, 761). The charge for this work is $145,680.75, an amount so suspiciously large as to call for strict proof. Yet, no allowance is made in the evidence so thrown in for plant, tools; and extras are confused with contract work.

The statements all blend the cost of the work done under the contract with work with which we have nothing to do. (Record, 120, 242, 244, 334, 635 and 636.)

Mr. Graham commenced to do certain work not covered by the bond, and in completing it the United States has "lumped together," in one item, the whole cost of that work and the

work covered by the bond. No attempt was made at segregation. (Record, 248, 335, 336, 349, 350.)

How can the bond be held for this?

Is there not manifest error in the refusal to grant the defendants' 9th, 10th and 11th prayers? (Record, 908.)

The plaintiff's prayer as to damages was, we submit, improperly granted. The contract provides, in paragraph 4, which is the basis of this suit, "The United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part."

The plaintiff's 19th prayer, as amended, charges us with the "reasonable and necessary cost to the plaintiff, the United States of America, for transporting, cutting and delivering the *granite mentioned in this case.*" (Record, 904.) Extra granite, of considerable importance in the way of cost, was "mentioned in this case." But the prayer credits us only with the "amount specified in the contract." The error is apparent.

Indeed, the whole question of damages is disposed of in a manner absolutely in conflict with the elementary principles of Hadley vs. Baxendale, 6 E. R. C. 617.

Net Dimension Blocks.

According to the fifth paragraph of the specifications (Record, 41) the Bethel granite was to be furnished to Mr. Graham in "*net* dimension blocks."

According to the evidence, there are three kinds of blocks of stones for cutting: "random," "dimension" and *"net dimension."*

"Random" stone is not quarried with a view to having cut from it a block or cube of any particular dimensions. A "dimension" block is quarried for the special purpose of being cut into a cube of certain *dimensions.* It is sufficient, if it is reasonably near the dimensions given, although there is a conflict of testimony as to what is *reasonably near.*

"A *net* dimension block" is, according to various views given in the evidence, a "perfect block," a "sawed block," "close to a sawed block," a "channelled block," "the best pattern,"—"net means net." But it is quite clear that "net" means something, and that a *net* dimension block, is something better than a dimension block.—something extraordinarily good.

The importance of this point can not be overestimated, as the cost of labor, which is the main cost of cutting, may be ten times as much on a stone improperly quarried and prepared for the cutter, as it would be on a "net dimension block." In the one instance a contractor might become rich; in the other he might end in bankruptcy.

A proper application of this distinction can be had only from a careful inspection of the record; and the attention of the Court is respectfully invited to the following pages for testimony on both sides of this question: 286, 330, 332, 361, 500, 501, 573, 576, 577, 592, 603, 638, 665, 682, 684, 690, 692, 705, 708, 711, 714, 715, 716, 727, 728, 790, 810, 819, 820, 841.

This was really the only question which was submitted by the Court to the jury and that only to a very limited extent. The Court said to the jury, among other things, in reference thereto:

> "On February 10, 1908, Mr. Graham wrote to Mr. Green that he intended to devote his yard to the contract, the payments to be made to him as previously, which tends to show that up to that time, although there had been complaints of the roughness of the stone, it

may have been on the whole average such as would gratify the contract. But, if you find that in the latter part of February and the early part of March the stone in point of its dimensions and roughness did not comply with the contract, then, if you so find, Graham could not be held to the further performance of his contract, and your verdict should be for the defendants." (Record, 869.)

All the prayers of the defendant were refused. We submit that the question should have been left to the jury without this narrow limitation. This was an exceedingly small margin of fact to leave to the jury in a case so replete with disputed testimony, as to many facts. It can hardly be said that the jury were "left free to consider the evidence for themselves."

Lincoln vs. Power, 151 U. S. 442.

Before discussing the law as to the instructions on this subject, we submit that the Court erred in refusing to admit in evidence the contract between Superintendent Green and the Thompson-Starrett Co. as to the furnishing of this very granite which was to be cut by Graham.

The Court will remember that this Bethel granite was to be supplied to the United States by this Company (Record, 282, 320, 360, 572, 647), and we wished to show that, while the Superintendent agreed to furnish it to us in proper "*net dimension* blocks," this Company had agreed to furnish it only in proper "*dimension blocks.*"—an entirely different thing. (Record, 896, 37th Asst. of Error.)

We regard this as a very salient fact in support of our contention that we were not getting "net dimension blocks." Of course, the Thompson-Starrett Co. was not going to furnish something that it had not agreed to furnish, as becomes more apparent in a letter from that Company to Mr. Green found

in the Record, at page 851. This Company which was furnishing the granite was an unsuccessful competitor with Graham for this very work in the cutting of stone on Pavilion C.

In that letter the Company contends that, "We cannot see how it can be expected of us to give him patterns better than the average produced by the quarry." We had nothing to do with *average* blocks. Mr. Green had agreed with us that, "the necessary Bethel granite stock, in *net* dimension blocks, is to be furnished to the Government by the present contractor, free on board cars at the quarry at Bethel, ready for the contractor for the cutting of the granite to transport it to his cutting yards for that purpose." (Record, 41 and 42.)

Was it not a very important fact to submit to the jury the very best evidence, the contract itself, to show that this contractor had agreed to furnish an entirely different thing? "Dimension blocks" are not "*net* dimension blocks."

The *nexus* between the principal and evidentiary fact is indisputable. The evidence offered (the contract) was *relevant, material and weighty;* and its rejection constitutes, we submit, plain reversible error.

Now, let us take up the instructions granted and refused on this important question of "net dimension blocks." The Court's independent instruction on this point is found in the Record, at pages 868 and 869. The "several matters of law" excepted to are paragraphs first to ninth, inclusive. Record, 870 and 871. The Court rejected the defendant's second, third and 24th prayers on this subject. (Record, 905 and 914.)

The effect of the Court's instruction was generally to limit the jury's inquiry to a small scope, and the application of even this small scope was restricted to only a few loads of granite. That did not fairly submit to the jury this important phase of our case. The Court's action was erroneous,

because the instructions had "a tendency to withdraw from the consideration of the jury a considerable amount of important and pertinent testimony."

Clemens vs. Packer, 125 U. S. 309;

See also—

Jewell vs. Jewell, 1 Howard, 219.

The Court practically decided nearly all the facts, whereas the "facts should be left to the jury in unequivocal terms."

McLanahan vs. Universal Ins. Co., 1 Peters, 170.

From the Court's action on the facts, the jury could not "distinctly understand that what is said as to facts is only advisory, and in nowise intended to fetter the exercise of their own independent judgment."

Nudd vs. Burrows, 91 U. S. 426.

Jury trial may not mean quite as much as our forefathers at Runnymede hoped; but its constitutional guarantee means something.

Referring to the Defendants' Prayer No. 2 (Record, 905), we submit that the meaning of the words "net dimension blocks" was solely for the jury's judgment.

This is *technical language*, and it constitutes a well-known exception to the rule that the interpretation of contracts is for the Courts.

Evidence as to the meaning of these technical terms was properly admitted, and the jury should have been the exclusive judges of this testimony.

See—

17 Cyc. 685.

There was ample evidence to support the hypothesis of the Defendants' 24th Prayer (Record, 914); and its conclusion is indisputable.

Now, let us look at the Defendants' Prayer No. 3 (Record, 905), which was denied with all the other prayers of the defendants. This prayer was prepared with great care; it is predicated on facts, each of which is supported by the evidence; no fact is therein assumed; no question of law is submitted; it is specific, clear and definite; and we earnestly contend that its hypothesis and conclusion are proper, and that the prayer should have been granted.

Besides, the specially pointed out objections which we have already urged against the Court's instruction in this matter, we invite attention again to these directions (Record, 868), and the points excepted to (Record, 870). In the first four paragraphs the Court has hopelessly confused "dimension" and "net dimension" blocks. The "wide difference between the witnesses," which the Court asks the jury to reconcile, refers to "dimension," and not "net dimension" blocks.

See testimony already pointed out in this division of our brief.

Indeed, the confusion in the Court's mind is apparent from the instructions (Record, 868 and 869), and the parts specially excepted to (Record, 870). The fifth paragraph (Record, 870 and 871) is also hopelessly confusing. It reads: "Mr. Graham has said, I think you will recall, that it was not expected that the blocks described as net dimension should be either sawed or cut before he received them, but might run 2 or 3 inches in excess of the dressed stone, and that the rough stone should not average more than 225 pounds to the cubic foot of dressed measurement, and should be often something less."

This was an unfair and incorrect segregation and pointing out of certain testimony, and other important evidence was ignored, without any admonition to the jury to give the unmentioned evidence proper consideration also. Besides, part

of the evidence mentioned had no reference to "net dimension blocks."

See—

Allis vs. U. S., 155 U. S. 124.

To the first proposition in this paragraph, the size of the blocks. Mr. Graham said: In net dimension it is perfect. It is either a sawed block or a cut block. Everybody knows what a net dimension block is; it is either cut or sawed. A net block is a perfect block, and it has either got to be a sawed block or a cut block. It is sent to my yard that way so I can bush it up and put the moulding on the same as marble or soft stone." (Record, 790; see also page 787.)

Ques.—"Your understanding of the contract was that you were to get a cut perfect block?"

Mr. Graham—"I don't say that; that is what the specification says; I was satisfied if it was an inch or two or even three inches"—

Ques.—"Two or three inches over?"

Mr. Graham—"I do not mean on all sides; but if they are going to lay off an eight-inch piece they cut a 17 or 18 inch stone and slab it in half. I don't see why they should have sent all these rough blocks down for me to cut." (Record, 810.)

Ques.—"What did you take those words 'net dimension blocks' to mean?"

Mr. Graham—"I said these are going to be the best patterns that have ever come into Baltimore when I saw that in there; but since I found out that a net dimension block means a perfect block; and I am trying to hold you now to that specification."

Ques.—"Your idea is that it is 165 pounds to the square foot?"

Mr. Graham—"Yes, sir."

The Court—"I can not see the use of going into that. Mr. Graham said that he would have been satisfied with a block had it been 2 or 3 inches larger."

Mr. Graham—"I mean a good pattern, split as they do in other quarries, with one face right; but they never gave me no face right." (Record, 819.)

Mr. Graham—"Reading that specification you would take it all to be very nice and neat patterns when they say net dimension stones—that is, as near as could be quarried—but a net dimension block calls for a sawed block."

The Court—"But you did not expect anything of that kind?"

Mr. Graham—"No, sir."

Ques.—"You wanted a stone that should have exceeded the dimensions given by about 2 or 3 inches?"

Mr. Graham—"That is right." (Record, 820.)

The second part of this paragraph purported to give Mr. Graham's statement as to 225 pounds to the cubic foot. But this statement has no reference of any kind or character to "net dimension blocks;" Mr Graham has so said repeatedly. (Record, 790, 818, 819, 820.)

This part of the instruction is, therefore, seriously misleading.

The Court, in the sixth, seventh and ninth paragraphs (Record, 871), limits the meaning of the terms "net dimension blocks" to the "meaning and intention of that stipulation" as "understood by the parties to the contract."

This suit is not on the contract; it is on the bond which assures the performance of the contract, not according to any special construction which the parties may place upon it, but "according to the *true intent and meaning of that contract.*"

It is true *inter partes,* "when the language of a contract is uncertain the acts and conduct of the parties may be consid-

ered to discover the meaning of the language used, but the parties can not testify as to their understanding or interpretation of the contract."

Diamond vs. Shriver, 114 Md. 643;

See also—

American Co. vs. Roberts, 112 Md. 23;
Dixon Co. vs. McDonald, 103 Md. 381;
Mitchell vs. Wedderburn, 68 Md. 139.

But even a *party* is not bound by "any construction which he may have put upon the instrument."

Ringgold vs. Ringgold, 1 H. & J. 11;
Hutchins vs. Dixon, 11 Md. 40;
Varnum vs. Thurston, 17 Md. 500;
Stockham vs. Stockham, 32 Md. 209.

Now, if a party is not bound by his own construction, is the surety bound by it? Can the plain language of a bond be changed by any such action erroneous or otherwise on the part of an illiterate principal?

Here is a contract containing the words "net dimension blocks." Those words mean something. In a suit on the bond, can the surety be held for any special meaning which the parties may happen to place on those words? Or should it be held only for the "true intent and meaning of that language?"

The eighth paragraph of the Court's instructions (Record, 871; see also 869) virtually withdrew our case from the jury.

Nothing is left for the jury to decide back of February 10, 1908; and only a very few loads were received after that.

The whole case can hardly be stricken down by one letter written by an indifferent clerk for an illiterate man. (Record, 797.)

Besides, it does not state a fair inference from the letter, which complains about "delay of not receiving *proper* stock from the quarry." (Record, 347.)

It also ignores testimony of the writer tending to show that it was of no use to complain to Green. (Record, 822 and 792.)

The jury could not after this instruction "distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise of their own independent judgment."

Nudd vs. Burrows, 91 U. S. 426.

It can not be said that therein "all matters of fact are ultimately submitted to the determination of the jury."

Lovejoy vs. U. S., 128 U. S. 171.

This is plainly "an instruction the tendency of which is to withdraw from the consideration of the jury a considerable amount of important and pertinent testimony," and it is, therefore, fatally bad.

Altogether, the Court's action in rejecting the evidence aforesaid as to the failure to furnish the granite in proper "net dimension blocks," in refusing the defendants' prayers, and in giving the independent instructions complained of amounted to a denial of the right to a jury trial.

DELAY IN DELIVERY TO CONTRACTOR.

The Court said (Record, 873):

> "The furnishing of the cars was at the risk of Graham."

This is a repetition of the old error of imputing some special magic to the words symbolized by f. o. b., whereas the thing is to find out the real intention of the parties as shown by their contract.

6 L. R. A. N. S. 928;

28 L. R. A. N. S. 1007.

The specifications say:

> "The necessary Bethel granite stock, in net dimension blocks, is to be furnished to the Government by the present contractor" (Thompson-Starrett Co.), "free on board cars at the quarry in Bethel, *ready for the contractor for the cutting of the granite to transport* to his cutting yards for that purpose." (Record, 41 and 42.)

The contract provides:

> "The party of the second part shall transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry at Bethel, Vermont." (Record, 57 and 58.)

It is thus clear that the Thompson-Starrett Company was to furnish the stock to the Government f. o. b. "cars at the quarry in Bethel ready for the contractor * * * to transport;" and until it was so furnished Graham had no duty to perform; and after it was so furnished it was Graham's duty to transport it to his cutting yards.

The intention is too plain for argument.

There is no rule of law which gives to particular words a meaning not intended in a specific contract.

Furthermore, the contract in this case was to have been completed by October 1, 1907. The granite stock was to have been furnished to Mr. Graham "without unnecessary delay." (Record, 42.)

The Thompson-Starrett Co., which had a contract for cutting a part of the granite for the Museum building, agreed also to furnish all the necessary stock within *two* years from the date of the completion of its cutting contract. (Record, 896.)

There was great difficulty and delay in getting stock till Graham was pretty well starved out by idleness at his yard.

This contract and its subsequent extension go far towards explaining the cause of the delay. The Thompson-Starrett Co. was not obliged to furnish the stone at this time, and it did not furnish it. Yet, the Court refused to admit the contract in evidence, as will more fully appear from the 31st exception and 37th assignment of error. (Record, 750, 751, 886, 895, 896.)

In fact, only about 10,000 cubic feet were delivered prior to October 1, 1907, as we have already shown (Record, 404), and the Thompson-Starrett Company did not complete its cutting contract till that date. (Record, 595.) It is a salient fact that in the next three months more than 20,000 cubic feet were furnished. (Record, 404.)

We submit that this agreement, showing that it had "two years from the date of the completion of this contract" to furnish the stone to Graham, would have been cogent evidence on the issue of delay which the Court subsequently withdrew from the jury. This is equally true of the extension of this contract and the lease of the quarry. (See 32nd and 33rd Exceptions, Record, 751, 755 and 756, and 38th and 39th Assignments of Error, Record, 899 and 900.)

Now, let us take up the Court's actions on the instructions relating to delay.

It is respectfully submitted that the Defendants' Prayers Nos. 4, 5 and 6 are amply supported by the evidence and properly present the law. (Record, 906 and 907 and 43, Par. 9.)

The Court absolutely withdrew the question of delay in all its phases from the jury, and in addition said:

"If the stone was ready for delivery on board the cars in advance of the cars being furnished to receive it, and if the Government, by its agents made all reasonable efforts to see that the cars were furnished, then the defendant, Graham, was not justified in abandoning his contract, even though the cars came irregularly and not promptly."

"The Government, by its contract, did not bind itself to furnish transportation for the stone; it was to be delivered to Graham at Bethel at the quarry, and was after that at his risk and cost of transportation until delivered by him at the government grounds at Washington."

The Court interrupted counsel for the defendant, during his argument to the jury, and said:

"I have said more than once it was not the duty of the Government to furnish the cars. I have said that I thought it was the duty of the Government to co-operate with the parties who were shipping the stone in a reasonable manner, in order to facilitate the shipment. The furnishing of cars was at the risk of Graham. I do not see that that letter throws any light on the furnishing of the cars." (Referring to the letter of February 8, 1908, from Bernard R. Green, Superintendent of Construction, to Thompson-Starrett Company.)

"In a contract of that kind, I think there was an obligation on both parties to furnish cars—that reasonable efforts should be made to accommodate each other."

"I say to you and to the jury that there is no evidence of delay, because the cars were not furnished. It was not the duty of the Government to furnish the cars."

"I have said that the question of delay should be ruled out of the case. Graham never raised the question of delay. They never charged him with default because it was not delivered up to the time."

"I do not think there is evidence upon which the jury would be allowed to say that Graham was justified in abandoning the contract on account of delay in the delivery of stone. I do not think that can be shown. You may argue upon the fact of the difficulties of proceeding with the contract, because of the excessive weight of the stone and the way in which it was delivered at the quarry. That may be dwelt upon; but as a distinct issue, that the jury may find

against the Government, because the stone was not delivered in time. I have said there was no sufficient evidence."

"I ought not to let the jury find against the Government now, because of delay in furnishing the stone, because there never was an issue distinctly raised. Graham said, 'I am going on now. I am going to devote my whole yard to the performance of the contract.' That letter which Graham writes urging upon the quarryman to furnish the stone, I do not understand that that means they made no efforts." (Record, 917 and 918.)

Furthermore, please note the defendants' ninth plea (Record, 25), and the plaintiff's eighth prayer (Record, 904).

Expressions in some of these instructions clearly show that the distinguished Judge, who heard the case below, never really appreciated the issue of delay.

In the contract the Government undertook to see that the Thompson-Starrett Co. would furnish us the necessary granite stock "without unnecessary delay."

What was "unnecessary delay" under the circumstances was a question of fact for the jury. Our contract with the Government was to have been completed by October 1, 1907; promptness in delivering to us meant the difference between profit and bankruptcy; the Government's contract with the Thompson-Starrett Co. did not require that Company to deliver to us any granite whatever by October 1, 1907. Indeed, as extended, the Thompson-Starrett Co.'s agreement with the Government gave that Company "two years" from that time, to wit, October 1, 1907, the time of completion of its cutting contract, to deliver to us our granite. Now, the Court excluded that contract from the evidence, and said there was no legally sufficient evidence to submit to the jury on the issue of delay; and he refused to permit counsel to read to the jury in the argument the letter of the Superintendent, dated February 8, 1908, just a few weeks before the

annulment of the contract, to the Thompson-Starrett Company. (Record, 918 and 753.)

In that letter the Superintendent says to the Thompson-Starrett Company after complaining of delay in delivering the stock, "*You are still in danger of charges for delaying the construction of the building, and it behooves you to enter upon and adhere to much more effective operations in the quarry.*"

The Superintendent admits that there is delay; the Court says there is no legally sufficient evidence of delay. Furthermore, the Court's statement in the fourth paragraph (Record, 918) shows that he is beside the mark. Then, in the sixth paragraph (Record, 918), he refers to some letter "which Graham writes urging upon the quarryman to furnish the stone;" and there is no such letter in the evidence. This was all exceedingly confusing; but the Court absolutely took away from the jury this whole question, and not only was it a *concessum* in Green's letter aforesaid that there was delay in furnishing the stone to Graham, but the Government, before the defense had offered any testimony, tried to explain it away and lay the blame on the setting plans and car shortage. It developed that there was no serious trouble about cars after the Thompson-Starrett Co. completed its cutting contract on October 1, 1907; and the efforts to charge the delay to our slowness in preparing setting plans were just as futile. "Setting" plans, not "quarrying" plans, are contemplated in the contract. (Record, 43, par. 9.)

There is ample evidence tending to show that the delays on the setting plans were due to the Government's delay in approving them, because of Green's absence in Europe, and because of the numerous changes which were made by the United States. The first, second and third plans were approved on December 21, 1906; the second and third, on January 22, 1907; and the sixth, on February 9, 1907. These six plans represented far more stone than we were able to

get during the entire contract period ending October 1, 1907. Plan No. 7 was received at the office of the Superintendent on March 20, 1907, when that official was in Europe; his clerks had no time even to look at it till April 29, 1907 (see letter); and it was not finally approved by reason of changes and for other causes till August 20, 1907,—seven months after its preparation. It required from October 11, 1907, to January 29, 1908, for the Superintendent to approve Plan No. 20, because he made a change of more than 12 feet in the circumference of the dome, this change being due to a mistake of the Government (Record, 302). There were other great delays in approving the plans, and the Government offered a mass of evidence tending to prove that the work could not proceed at the quarry without them. If we thus delayed the quarry in furnishing us the stone, we are responsible; if the Government delayed the quarry by holding back the plans, it is responsible. In any event, it was a question for the jury, as more fully appears from the evidence at the following pages of the Record: 89, 106, 107, 254, 256, 257, 258, 259, 261, 264, 266, 271, 273, 275, 276, 277, 281, 282, 283, 289, 290, 292, 295, 302, 303, 363, 374, 378, 384, 505, 508, 773, 775, 798.

The evidence further showed that we were nearly eight months in getting all the stone embraced in Plan No. 1, and nearly ten months had elapsed before we got all the stone on Plans 4 and 5.

Independently of the question of "setting plans" and alleged "car shortage" and "f. o. b." responsibility, the Record is full of testimony tending to show that the Thompson-Starrett Co. did not furnish us with the "necessary granite stock" "without unnecessary delay." See in addition to evidence already referred to, Record, 39, 41, 42, 57, 58, 314, 315, 317, 319, 320, 322, 347, 404, 489, 493, 562, 572, 576, 592, 593, 595, 596, 597, 647, 679, 685, 751, 753, 754, 755, 759, 767, 785, 808, 812, 851. Graham repeatedly complained

of the delay. Holding it back for months, till the arrival of winter, when he could not handle it, meant bankruptcy to him.

There was ample testimony tending to show that the delay was the fault of the Government on the one hand, and ample evidence that it was our fault. The question was eminently one for the jury, and the excluded evidence should have been admitted.

Payments to the Contractor.

Under the 41st paragraph of the general conditions (Record, 53), "payments will be made from time to time as the progress of the work may warrant. A percentage of 10 per cent. will be reserved from each payment until the whole of the cut granite called for by the annexed contract shall have been satisfactorily delivered and accepted." *The payments are in no way conditioned upon Mr. Green's judgment.* The progress of the work could only be determined by ascertaining the amount of the whole work and the proportion completed.

Yet, the Government, with all its engineers and employees, has never actually calculated the number of cubic feet in this contract. Green *estimated* it at 60,000 cubic feet. This was not much more than a guess. (Record, 149). Pirie *estimated* it at 61,428. (Record, 422, 452.)

But he did not claim to be accurate. (Record, 488.)

Freas made some calculations reaching 62,768 feet, but he excluded parts of the contract and included things not in the contract. (Record, 546.)

Sheehy never made any calculations. (Record, 854.)

It was left to us to ascertain what was in the contract.

It amounted to 59,368.

See testimony of engineers. (Record, 761, 762.)

It is conceded that Graham cut 27,507 cubic feet and 1,911 stones. (Record, 469, 470.)

There was testimony tending to show that the work done by the contractor was a fair average of all the work. (Record, 687, 798.)

Yet, the Court ruled that this clause of the contract conditioned the amount of the payments absolutely upon the judgment of Mr. Green. (See 19th Exception and 25th Assignment of Errors, Record, 344, 884.)

Furthermore, the Court refused to grant the defendants' 7th and 8th prayers (Record, 907), presenting to the jury the reasonableness *vel non* of the payments. All we ask this Honorable Court to do is to examine the 41st paragraph of the general conditions (Record, 53), and say whether Mr. Green or the jury is the judge thereunder.

Is it not simply a question of fact for the jury?

Time Limit.

The defendants' fourteenth pleas (Record, 15 and 26) and 22nd prayer (Record, 914) raise the same question. Demurrers to these pleas were sustained, and this action is the subject matter of the 5th and 6th assignments of errors. (Record, 877.) The 14th plea of each defendant sets up the defense clearly warranted by the 4th and 5th paragraphs of the contract. (Record, 26 and 27.)

This contract under seal has a definite time limit—October 1, 1907. (Record, 42.)

Paragraph 4 provides for annulment; paragraph 5 provides for the only method by which the time limit can be waived. Without notice to the surety, the work had hardly begun on October 1, 1907; only about 8,000 (Record, 404) cubic feet out of nearly 60,000 had been cut; paragraph 5 provides for the only way by which the Government "may, in lieu of annulling the contract under the preceding paragraph, waive the time limit;" that was not complied with in any respect; nothing was done; there was no "waiver" of the time limit under the terms of the contract.

It is clear in principle that, when the *work covenanted to be done was not finished and completed within the time and Graham was permitted to go on with the work, the sealed instrument was at an end.*

The authorities are clear on this point.

"If there be a special agreement under seal to do work, and it is done, but not pursuant to the agreement either in point of time or in any other respect, the party who did the work may recover upon the common counts in assumpsit, for the work and labor, if the work be accepted by the party for whom it was done. The workman can not maintain covenant unless he perform the work strictly within the time."

Jewell vs. Schroeppel, 4 Cowen's Reports, 564.

If the contract is not performed within the time limited for its performance, it is at an end, and the parties must depend on assumpsit.

4 Taunton's Reports, 745;

See also—

Lucas vs. Goodwin, 3 Bingham's New Cases, 737.

"After the failure to complete the work under the conditions of the sealed instrument, a new and distinct agreement arose from the acts of the parties."

The specialty was at an end.

Orem vs. Keelty, 85 Md. 337, 344;

Kendrick & Roberts vs. Warren Bros., 110 Md. 47, 74.

The fifth paragraph provided a means of keeping the contract alive after the expiration of the time. It cannot be contended that it was complied with.

ALTERATIONS.

Although the Government can not now say how much money it has spent on the original contract and how much on alterations, the Court withdrew from the jury the whole issue of alterations. (Plaintiff's 13th Prayer, Record, 904.)

As we have already shown, all these items within and without the contract were "lumped together" in derogation of our rights under the law.

The Defendants' Prayer No. 11 (Record, 908) accurately presents the facts (Record, 336), how can its conclusion be wrong?

Paragraph 6 of the contract *providing for changes* (Record, 59) was never complied with by the Government. The Defendants' 13th, 14th, 18th and 21st Prayers (Record, 909, 911, 913) were erroneously refused, we submit. The *time was extended long past October 1, 1907, without the surety's assent.* (Record, 762.) Nearly every setting plan was changed; the dome was changed and increased in circumference by more than 12 feet. (Record, 239, 302, 303, 304, 308, 363.) These alterations were not made in accordance with the contract; and the Superintendent, who framed the agreement and the bond, should be required to take the legal consequences. In addition to changes above mentioned, see Record, 240, 241, 242, 335, 336, 762.

This is an extension of our bond "beyond the fair scope of its terms."

Miller vs. Stewart, 9 Wheaton, 680;
Smith vs. Montgomery, 3 Texas, 199.

We have never consented to any such liability, and in the language of Judge Cooley: "They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent."

"The surety is bound only by the terms of his engagement."

2 Brandt on Suretyship, sec. 748.

"Equity always holds a surety discharged if the contract is materially changed without his knowledge and consent, because he has guaranteed the execution of a specific agreement, and a new agreement can not be substituted for it without his assent."

Schaeffer vs. Bond, 72 Md. 501, 507.

It is not contended that the surety had any knowledge of the changes in the plans, including the dome, and it certainly never assented thereto.

"If a material alteration is made in the contract without the surety's consent, he is discharged, even though the alteration may be for his benefit."

1 Brandt, sec. 427;

See also—

Stearns on Suretyship, secs. 72 and 79;
Erfurth vs. Stevenson, 72 S. W. R. 49;
Judah vs. Zimmerman, 22 Indiana, 388.

"Any change in a contract for the performance of which a surety is bound, made without his consent, will operate to relieve him from liability; and, when a change has been made in such contract, the burden rests upon one seeking to charge the surety to prove that he knew of and assented to such change."

United States vs. McIntyre, 111 Fed. 590 (1902).

"It is common learning that the contract can not be changed without the consent of the surety."

Orleans & J. Ry. vs. International Cons. Co., 113 La. Rep. 409.

It affirmatively appears that we never assented to an overrunning of the time without action under the contract, the

numerous changes in plans and the enlargement of the circumference of the dome by more than 12 feet. The proposed assent, prepared by the Superintendent, was never given by the surety.

"Any change in the contract on which there are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

Reese vs. United States, 9 Wall, 13.

This case is approved in Cross vs. Allen, 141 U. S. 537.

"A surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock is released by subsequent changes in the work made by the principal without his consent."

"The obligation of a surety does not extend beyond the terms of his undertaking, and when this undertaking is to secure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished."

United States vs. Freel, 186 U. S. 309.

"A surety who defends on the ground of an alteration in contract operating to release him has not the burden of showing that such alteration was without his consent when the plaintiff himself sets out the alteration in his statement of claim and introduces it in evidence."

Mundy vs. Stevens, 61 Fed. Rep. 77.

"Where defendant became surety for the performance by a tenant of the covenants of a lease for ten years which bound the tenant to keep and pay rent for the premises and at the expiration of the term to deliver them in good condition a modification of the contract before the tenant took possession, without the knowledge or consent of defendant, by the insertion of a provision that in the event of the total or partial destruction of the premises by fire or other casualty rendering the same untentable, the lease from such time should become void and should be surrendered to the lessor, constituted a material alteration which operated to discharge defendant from liability."

"In determining whether a surety is discharged by an alteration of the principal contract without his consent, the question is not whether the change was or could be prejudicial to him, but whether it affected a material alteration of the agreement to which his undertaking of suretyship related; and if it did, he is discharged, even though the change may have been beneficial to him."

"The rule as to the discharge of a surety by an alteration of the principal contract without his consent is not affected by the fact that his undertaking recites that was made by him for a valuable consideration."

Ziegler vs. Hallahan, 66 C. C. A. 1.

"This interruption shortening to nine months the term for performing an undertaking which by the contract was to be performed within twelve months affected a substantial deviation in the contract which the surety guaranteed; and the rule is familiar that any material alteration or deviation from the terms of a contract for the performance of which a surety is bound, made by the parties without his consent, will release him from his obligation."

Fidelity & Deposit Co., of Maryland, vs. United States, 70 C. C. A. 204; citing United States vs. Freel, 186 U. S. 309.

As akin to the question of alterations in the work, the absolute failure of the Government to comply with the fifth paragraph of the contract (Record, 27) without any notice whatever to the surety, operates plainly as a release of the surety. Certainly, the surety has some rights which the Government is bound to respect under its contract. The U. S. can not make alterations in a manner not provided by the contract,—anticipate payments,—grant extensions without notice, and then claim that the surety is not injured.

On this point, the Honorable Circuit Court of Appeals has said:

> "Finally, were such changes and alterations made in the contract without the surety company's consent as maintained in its special defense in this regard and which entitled it to release from its surety obligation?
>
> "This question, although elaborately argued, will need but brief consideration. The contract which the surety company guaranteed performance of in express terms provided that changes and modifications could be made and compensation should be allowed for extra work performed or material furnished. These changes and alterations were provided to be required in writing, it is true, and the letters produced in evidence between Green and Graham seem to us to be sufficient to meet all requirements in this particular. It is also shown that Graham and Green agreed on a sum of $4,000 for extra compensation for the extra labor performed and that he was given credit for this sum. In Atlantic Trust & Deposit Co. v. Town of Laurinburg, 163 Fed. 690; 90 C. C. A. 274, this court has determined that the rule of *strictissimi juris* will not be recognized as applying to contracts underwritten by these bonding corporations whose business it is to insure, for a monetary consideration, the obligee against a failure of performance on the part of the principal obligor. In such cases, before such

bonding company can be released, it must show that the changes made in the contract guaranteed by it, operated injuriously to affect its right and liabilities."

The decision in the case of Atlantic Trust & Deposit Co. vs. Laurinburg, *supra*, has not as yet been approved by this Court.

U. S. F. & G. Co. vs. U. S., 191 U. S. 424;
U. S. vs. American Surety Co., 200 U. S. 202.

Certainly when there is a provision in the contract itself as to alterations, it must be complied with. The Government recognized this necessity and prepared the *agreement in writing* (Record, 861 and 862) called for by the sixth and seventh paragraphs of the contract (Record, 59 and 60); and *it was never executed.* Can it be claimed that something else, which does not fill the requirements of the sixth and seventh paragraphs of the contract, as clearly appears by comparing their provisions with the letters,—will do just as well?

This Court has uniformly held that provisions similar to these mean just what they say.

Plumley vs. U. S., Decided Jan. 6, 1913.

Miscellaneous Ungrouped Points.

An objection, other than those already urged, to the eighth and sixth paragraphs of the Court's instructions (Record, 916 and 918), is the summary way in which the Court reasons out and declares a waiver. These instructions are not warranted by the letter referred to in the eighth paragraph, it being the letter first referred to in the sixth paragraph. The letter is found in the Record, page 347. It was for the jury to say, under proper instructions, whether this letter and the evidence that there was no use complaining about

anything amounted to a waiver of everything back of February 10, 1908. (Record, 347, 689, 792, 817, 822.)

The question of waiver is *one for the jury,* under the instruction of the Court.

Spring Garden Co. vs. Evans, 9 Md. 1;
Traub's Case, 80 Md. 224;
Pentz vs. Penn Co., 92 Md. 444;
Walter vs. Bloede, 94 Md. 90;
Sumwalt vs. Knickerbocker, 112 Md. 444.

The admission of a letter from Philip Walker to Superintendent Green forms the subject matter of the tenth exception and the 16th assignment of error. (Record, 130, 131, 132, 881.)

Mr. Walker's name as "attorney" appeared on a certain Washington letter-head, together with the names of Worthington, Heald & Frailey as "Local Counsel." (Record, 129.)

It is clearly shown that Mr. Walker is merely a *special* agent. (Record, 132.)

The admissibility *vel non* of this letter is determined by Maryland law.

The Title Guaranty & Surety Co. can not be bound by any admission or statement of Walker beyond his special authority. He was not a *general* agent.

Equitable Life Assur. Soc. vs. Poe, 53 Md. 28.

Besides, the whole letter is a bodily incorporation of what someone else, whose authority is not shown has said. It comes plainly within the rule excluding unsworn statements.

16 Cyc. 1192.

The Court of Appeals of Maryland passed directly upon the point involved in United Surety Co. vs. Summers, 110 Md. 110. Not only is there a want of authentication, but it is an unsworn recapitulation of what the Baltimore attorney said.

"Moreover, the paper was nothing more than what Mr. ——— *said* upon the subject. It was an unsworn statement, and no more admissible than his oral statement to the same effect."

United Surety Co. vs. Summers, *supra.*

Want of space prevents us from quoting at large from this case, which is decisive of the point now under consideration.

We submit that the paper was improperly admitted: a special agent can not bind his principal beyond the authority delegated to him; the paper is not properly authenticated; it is merely an unsworn statement of what some other attorney *said.*

We submit that it was error for the Court to permit a witness to testify as to the *customary and usual form* of setting plans. (29th asst. of error, Record, 885, 371.) The 9th paragraph of the specifications (Record, 43) provides for the form of the plans, and custom has nothing to do with the contract.

Besides, the plans were approved by the Superintendent, and it is too late to object to the form after approval.

In the cross-examination of Superintendent Green, the Court refused to allow the following question: "You have nothing here to show, then, how many cubic feet of stone you cut on the Graham job?" (17th bill of exception; 23rd asst. of errors; Record, 336, 883.)

It is submitted that this was proper and material as relating to the questions of payments to Graham and cost of completion.

The United States Attorney, on re-direct examination, asked Superintendent Green the following question:

"Doesn't a comparison of the blue print marked 'Superseded' and bearing upon it the endorsement 'Approved October 21, 1907,' and the tracing marked 'Approved January 29, 1908,' show that in the preparation of the first setting

plan an error had been made by Mr. Graham or his draftsman in the quantity of stone shown upon the course?"

(Mr. Harley: "Objected to as improper as to form and improper re-direct examination.")

"It shows that this is a new tracing. The original tracing, evidently, from which this blue print was made bears my approval marked 'October 21, 1907.' The similar approval marked and placed upon the new tracing in a similar spot shows that there was no previous signature or approval marked on that. That is perfect evidence to my mind that this is a new tracing made from the original one, and that the stones are corrected upon it." (Record, 359.)

This is the subject matter of the 27th assignment of errors. (Record, 884.)

As stated in our objection, the question is leading, and is also improper on re-direct examination.

The Court permitted the United States Attorney to ask Superintendent Green the following question on re-direct examination:

"On page 424 of the Record, your cross-examination, and on page 425, questions were asked you in reference to your absence from Washington; could or could not the work under the Graham contract be continued during your absence from Washington by your office force in Washington?"

His answer was:

"It could be continued and it was continued perfectly well." (Record, 354.)

This is the 26th assignment of errors. (Record, 884.)

Many things are conditioned in the contract and specifications upon the personal judgment of this witness, and he should not have been allowed to contradict a deed prepared and executed by him.

The Court refused to permit the counsel for the defendants to ask on direct examination Frank F. Graham the following question:

"What was it your intention to do about this Government work?"

This is assigned as the forty-first error (Record, 903). See also thirty-fifth bill of exception (Record, 805).

The Record, at page 804, discloses the fact that this witness had testified as to the events which happened up to the time of paying his men off. His story is incomplete. It is important to know what his intentions were as to his future course about this Government work. He wished to have an opportunity to say that, after the arbitrary conduct of the Superintendent, which subsequently led to his bankruptcy, he was going to try to induce Mr. Green to look at the matter reasonably and adjust with fairness his extras, or to place the matter before the Regents, so that he might renew his activities in this work with promptness.

This was calculated to countervail the testimony on the other side that the work was recklessly abandoned.

"While in civil cases one's liability rests upon the act, and the motive or intent of the act is usually immaterial and irrelevant, there are, however, many important exceptions to this rule, and in a great variety of cases evidence of the motive or intent with which an act is done is relevant and admissible."

11 A. & E. Ency. of Law, 507, and large number of authorities there given.

We submit that these authorities clearly place this evidence in this connection among the "many important exceptions." It is the only way he could wholly explain the disregard of the contract charged against him.

In any event "It is a poor rule that will not work both ways."

Mr. Green was allowed to testify to his intention in placing certain matters in the contract. (Record, 70, *et seq.*) Why should not Graham have the same privilege of explaining his intention?

GOOD FAITH IN THE ANNULMENT OF THE CONTRACT.

The breach of the bond sued on in this case is alleged to be the failure of Graham, "in the judgment of the Superintendent of Construction," to "prosecute the work," and the subsequent annulment of the contract by the Superintendent "with the sanction of the Regents." (Record, 5 and 6.)

The fact of failure *vel non* to prosecute is conditioned personally and absolutely upon the *judgment* of the Superintendent. The "power to annul" is conditioned personally and absolutely upon the "sanction of the Regents."

When a matter of this kind is left by the contracting parties to the judgment, sanction or approval of a designated party, such judgment, sanction or approval is conclusive only in the absence of *bad faith*.

Sweeney vs. U. S., 109 U. S. 618;
Chicago vs. Price, 138 U. S. 185;
Kihlberg vs. U. S., 97 U. S. 398;
U. S. vs. Gleason, 175 U. S. 588;
Filston Farm Co. vs. Henderson, 106 Md. 367;
2 L. R. A. 544;
5 L. R. A. 554;
17 L. R. A. 216;
B. & O. vs. Brydon, 65 Md. 225.

Mala fides is always a complete defense. *Idem*. Now, let us look at the third plea of each of the defendants. (Record, 6 and 17.)

It is respectfully submitted that the facts therein set forth are well pleaded, and, if true, they constitute *bad faith*. Yet, the Court sustained demurrers to each of these pleas; and this action is the subject of the first and second assignment of errors. (Record, 877.)

The fourth pleas of the defendants recite the same facts and further allege "that the said Bernard R. Green, Superintendent of Construction, did not communicate the above

matters and things herein set forth to the Regents of the Smithsonian Institution at the time when he obtained the alleged sanction of the Regents of the Smithsonian Institution to the annulment of said agreement, as set forth in said declaration, and that in failing to give such information to the said Regents, said Superintendent of Construction did not act in good faith." (Record 10 and 24.)

How could there be any good faith in the transaction, if he obtained the sanction of a quasi-judicial Board without a disclosure of these facts But the Court held, not only that these pleas were bad, but that there was no legally sufficient evidence of bad faith in the case.

See defendant's fifth plea (Record, 25) plaintiff's fourth prayer (Record, 904), 16th paragraph of Court's instruction (Record, 917), and defendant's prayers Nos. 11½ and 12 (Record, 908 and 909).

A study of the Record clearly shows that the question of good faith should have gone to the jury. Is there not a large volume of testimony as to the numerous changes in the plans, so-called mistake in the dome, delay in approving, failure to disclose facts to the Regents, working Graham at one end and Thompson & Starrett at the other, the Superintendent's trip to Europe just when he was most needed here, his many arbitrary acts, his agreement to furnish one kind of stone when his source of supply called for another kind, his agreement for completion before October 1, 1907, when the quarry under its contract with him was not obliged to furnish a stone in that time, and a mass of other circumstances, no one of which might amount to much in itself,—which when taken together warranted the submission of the question to the jury?

In the cases of this kind the evidence takes the widest range. (Castle vs. Bullard, 64 U. S. 172.)

In B. & O. vs. Brydon,, 65 Md. 198, Alvey, C. J., in affirming the action of the lower Court in submitting to the jury the question of goodl faith of the arbiter in a similar case, and in overruling a motion for a rehearing, said:

"The evidence produceed on the part of the appellee was all of an inferential charracter merely."—page 228.

"But all the facts andl circumstances attending and surrounding the entire tramsaction under investigation, that could in any manner refleect upon the motives and purposes of the officers and agents of the appellant, and particularly the two agents to whom the coal was to be satisfactory, were brought under examinatioon and scrutiny. In such case the nature of the inquiry itselff would seem to make it necessary that the case should go tto the jury, although the evidence might appear but slight. A question of motive and intent is always one of fact, and peeculiarly within the province of the jury. As was said by this Court, in Turner vs. Walker, 3 G. & J. 387, 'whether a parrty acted with a fair *bona fide* intention, or by what motivee he was really actuated, is always a question purely for the consideration of the jury.' I am, therefore, very clearly of the opinion that the Court below committed no error in allowing the case to be considered by the jury." (Page 231.)

Bryan, J., in the same ease said in handing down the opinion:

"But this term of the contract did not give them a capricious or arbitrary discretion to reject it. It was their judgment which was to decide the question of acceptance; but the law required them to exercise a fair, just and honest judgment on the subject." (Page 220.)

"On the question of fraud, it was proper that the evidence should take a wide range.'" (Page 221.)

A single fact or circumstance in itself may amount to little, but a number of similar facts, when taken together, may be sufficient.

To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is sufficient, and, in most cases, is the only proof that can be adduced.

Rea vs. Missouri, *ex rel.* Hayes, 17 Wall, 532;
Kempner vs. Churchill, 8 Wall, 362;
Castle vs. Bullard, 23 How. 172.

Circumstantial evidence of fraud is often of more force than direct testimony.

Kempner vs. Churchill, 8 Wall, 362.

Facts which, to the Court, might seem of no pertinence, and be rejected as having no legal tendency to show knowledge of fraud, may be considered by the jury as significant and indicative of a guilty participation.

Sonnentheil vs. Christian Moerlein Brewing Co.,
172 U. S. 401.

"Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

Castle et al. vs. Bullard, 64 U. S. 172.

Good faith *vel non* in all its phases is essentially a question for the jury.

Warner vs. Norton, 20 Howard, 448;
Thompson vs. Bank, 150 U. S. 231;
Davis vs. Schwartz, 155 U. S. 631;
Bank vs. Bates, 120 U. S. 556;
Rowe vs. U. S., 164 U. S. 546;
14 A. & E. Ency. of Law, 206.

This is particularly true in this case, because a *party* was the judge of important phases of the contract.

"The fact that the chosen umpire was an employee of the defendant does not of itself weaken the force of his decision; but the law requires of a person so situated the utmost diligence and good faith in the performance of his duties."

W. C. Edwards vs. J. A. Hartshorn, Vol. 1, L. R. A. (N. S.) 1050.

In the recent case of Bush vs. Jones, 144 Fed. Rep. 942, the Circuit Court of Appeals accentuates the doctrine that this is eminently a question for the jury. In a note to this case in 6 L. R. A. N. S. 774, the editor calls attention to the "tendency to relax the rule as to the sufficiency of the evidence" necessary to get such issues to the jury.

We submit that this question of good faith *vel non* should have gone to the jury.

The subject of the 18th assignment of errors is the refusal of the Court to permit counsel for the defendant to ask the Superintendent under cross-examination: "Did you ever communicate to the Regents of the Smithsonian Institution the changes made by you in setting plan No. 20." (Record, 883.) This referred to an enlargement of the circumference of the dome by more than 12 feet. (Record, 302, 308.)

This, we submit, was relevant evidence on the issue of good faith. Could he be acting in good faith if he suppressed so substantnal a change? The 19th, 20th, 21st and 22nd assignments of errors referred to similar questions reflecting upon the issue of good faith in the suppression by the Superintendent of substantial information.

Suppressio Veri (see generally the title Fraud and Deceit, Vol. 14, p. 12).—In Juzan vs. Toulmin, 9 Ala., 684, it was said: "Nearly allied to the fraud which is perpetrated by *suggestio falsi* is that which is inferable from *suppressio veri*. To constitute the latter, there must be a suppression of facts which one party is under a legal or equitable obligation to communicate, and in respect to which

he cannot be innocently silent, because the other has a right not merely *in foro conscientiae*, but *juris et de jure, to know.*"

A. & E. Ency. of Law. Vol. 27, page 425.

See also—

Terrell vs. Kirksey, 14 Ala. 212;
Torrey vs. Buck, 2 N. J. Eq. 366;
Wigmore on Evidence, secs. 285-291.

In the "wide range" allowed on the issue of *bona fides*, surely this testimony was admissible.

Sanction of the Regents.

When the bond, sued on in this case, was executed, it was clearly set forth that it was conditioned upon the performance of the contract "according to the true intent and meaning of said contract." The contract, after stating that the Superintendent was "acting under the direction of the Regents of the Smithsonian Institution" (Record, 57), provided that, if Mr. Graham "shall, in the *judgment* of the Superintendent of Construction, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then * * * the party of the first part, or his successor legally appointed, shall have power, *with the sanction of the Regents of the Smithsonian Institution*, to annul this contract by giving notice in writing to that effect." (Record, 56.)

The breach of this bond declared on and assigned is a failure to prosecute the work in the *judgment* of the Superintendent and his annulment of the contract *"with the sanction of the Regents of the Smithsonian Institution."* The "sanction of the Regents" is an essential part of both contract and declaration.

At the hearing below the attorney for the United States argued that this clause was not authorized by Congress, and that it was, therefore, not binding. To that we have two

answers: he declares solely on this clause, and, if he can recover at all, he must recover on it. *Secundum allegata.*

21 Ency. Pl. & Pract. 650;
Smith vs. Smick, 119 Md. 282;
Coughlin vs. Blaul, 120 Md. 28.

Furthermore, if an essential part of the contract is, as to the Superintendent, *ultra vires* and void, the whole contract necessarily falls, and there is nothing to recover on.

To this point, the Circuit Court of Appeals devotes considerable space; but we submit that it can not be contended that Green did not have broad powers under the Act of Congress as to making the contract. He was building for the Regents; and certainly it was within his power to make them umpires without a special Act for that purpose. (See Act, Appellants' Brief, pp. 1 and 2.)

It is the practice of the Government to make officials of the various departments final arbiters as to matters arising under its contracts without special laws authorizing such action; and the finality of such decisions has been frequently approved by this Court.

Now, the fact of failure to prosecute *vel non* is conditioned absolutely upon the *judgment* of the Superintendent, but he has "power to annul" only "*with the sanction of the Regents.*" Nobody can exercise that *judgment* for the Superintendent; no one can give that *sanction* for the Regents. Both are personal. Neither can be delegated to a subordinate. We had a right to rely upon the provision that, no matter how arbitrary the judgment of the Superintendent might be, he could not unfairly annul the contract, because he had no power to annul without the sanction of the Regents themselves; and we could safely rely upon their fairness and ability. There was no trouble in ascertaining who would be our final judges in this matter. The United States Compiled Statutes, Title 73, page 3742 *et seq.*, informed us that the most distin-

guished men in the country "constituted an establishment by the name of the 'Smithsonian Institution.'"

"The *business* of the institution shall be conducted at the City of Washington, by a Board of Regents, named the Regents of the Smithsonian Institution, to be composed of the Vice-President, the Chief Justice of the United States, and three members of the Senate and three members of the House of Representatives, together with six other persons, other than members of Congress, two of whom shall be residents of the City of Washington, and the other four shall be inhabitants of some State, but no two of them of the same State."

U. S. R. S., sec. 5580.

Besides, the building was being constructed for the Regents under the Act of March 3, 1903. We had a right to the "sanction of the Regents." Indeed, it is only reasonable to believe that if the matter had been referred to the Regents for their sanction, they would have given us a fair hearing, as is always done in similar cases when naval or other government boards are given judicial powers.

Sanction means something. Its usual and ordinary signification is clear.

"Sanction (sank'shun). n. (L. sanctio, from sancire, sanctum, to render sacred or inviolable, to fix unalterably; cf. F. sanction. See Saint.) 1. Solemn or ceremonious ratification; an official act of a superior by which he ratifies or gives validity to the act of some other person or body; establishment or furtherance of anything by giving authority to it; confirmation; approbation.

The strictest professors of reason have added the *sanction* of their testimony. *I. Watts.*

2. Anything done or said to enforce the will, law or authority of another, as, legal *sanctions.*"

Webster's International Dictionary.

What kind of *sanction* did we get?

On March 18, 1908, the Superintendent wrote a letter to Charles D. Walcott, Secretary of the Smithsonian Institution, recommending the annulment of the contract and asking the sanction of the Regents, and on the same day the Secretary, "on behalf of the Board of Regents," formally *approved* the annulment of the contract. (Record, 75, 76, 77.)

It is a *concessum* of the case that the Regents never knew anything about it. (Record, 85.)

The Court ruled that this provision of the contract was gratified by the Secretary's action, although his duties are clearly prescribed and limited by Act of Congress.

"The Secretary of the Board of Regents shall take charge of the building and property of the institution, and shall, under their direction, make a fair and accurate record of all their proceedings, to be preserved in the institution; and shall also discharge the duties of librarian and keeper of the museum, and may, with the consent of the Board of Regents, employ assistants."

U. S. R. S., sec. 5583.

This is not the sanction of the Regents. Even the action of the President himself would not have been sufficient.

10 Cyc. 903.

Even separate assent of the Regents would not have been enough.

10 Cyc. 775, 776;
Humphreys vs. McKissock, 140 U. S. 304, 312;
De La Vergne Co. vs. German Sav. Inst., 175 U. S. 40;
Miller vs. Matthews, 87 Md. 474.

The Secretary is not even a member of the Board, and his act was merely formal.

The sanction of the Regents is the sanction of the Regents,—a personal quasi judicial act of the body which can not be delegated. The annulment is conditioned upon that sanction; the discretion placed in the Board of Regents is conclusive in the absence of bad faith, and it can not be exercised by another.

Aetna vs. Fuller, 111 Md. 344;
30 A. & E. Ency. of Law, 1242;
3 Halsbury's Laws of England, 221.

This power to judge is delegated to the Regents. *Delegatus non potest delegare.*

"Authority to do acts merely ministerial or mechanical may, it seems, be delegated, but not so where it involves the exercise of judgment and discretion."

Powell vs. Tuttle, 3 N. Y. 396.

"The distinction between powers requiring judgment and discretion and the performance of merely ministerial duties in relation to detail was not under consideration in any other Michigan case to which we have been referred (other than Campau vs. Detroit, 106 Mich. 418, which was controlled by the city charter), and certainly none of these cases deny the distinction, which is now fully recognized and established by well considered cases in other jurisdictions."

Cass Co. vs. Gibson, 107 Fed. 363 (370).

"It may be taken as well established law that wherever trusts of discretionary powers are to be exercised the exercise can not be delegated."

Coquard vs. Charlton Co., 14 Fed. 203 (204).

In Lyon vs. Jerome, 26 Wend. (N. Y.) 485, the Court said:

"In all cases of delegated authority, where personal confidence is reposed in the agent, and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely *personal,* and can not be delegated to another, unless there be a separate power of substitution."

"Mere executive or ministerial powers may be delegated, but not judicial or discretionary powers."

"In this case there was no exercise of any judgment or discretion whatever by the Commissioners; there was merely such a general reliance on the supervision and judgment of the engineer as might amount to an implied delegation of authority, had the Commissioners been authorized by law to make such a substitution."

Where there is something to determine or decide, where judgment or discretion is to be exercised, the function is plainly judicial, and not a matter of ministerial detail; and it is immaterial whether the power to decide is vested in an individual, such as an engineer or architect, or in a board,—the power to judge can not be delegated.

The Court, in the 13th, 14th and 15th paragraphs of his independent instruction, treated, the *sanction* of the Regents as a "matter of detail," and held that the "Secretary, acting for the Regents, gave his consent to the annulment in the proper manner."

37th Bill of Exceptings and 44th Asst. of Error, Record, 872, 916 and 917.

It is clear in principle and authority, we submit, that this was not merely a matter of ministerial detail, but a power or trust requiring judgment and discretion.

In the first bill of exceptions, eleventh asst. of errors (Record, 70 *et seq.*), the attorney for the United States was permitted to ask the question:

"Mr. Green, in the Articles of Agreement it is stated that you made the agreement as Superintendent of Construction

acting under the direction of the Regents of the Smithsonian Institution. Why was that put in there, and did you act under that direction?"

The witness explained that it was a "matter of courtesy."

We submit that there is no principle of law which will permit a party to a sealed contract, prepared by him, to explain why he "put in" certain plain provisions and then to depreciate their importance. The patent unambiguous provisions of the contract should be allowed to speak for themselves, under the Court's instructions.

The Assistant Secretary, Mr. Rathbun, was allowed to testify "what the approval of the Smithsonian Institution means." (Record, 79, Second Bill of Exceptions, 7th Asst. of Errors.)

This is a mixed matter of law and fact, as is shown by his answer: "It is printed in statutes among the Acts of Congress." This is not the way to prove acts of Congress, and the error in the admission of this testimony is made manifest, as there is no such statute "among the Acts of Congress."

This same witness (third bill of exceptions, 8th asst. of error) is allowed to testify as to documents and resolutions. (Record, 878.) He testified that "the Secretary is given entire authority to plan and conduct the operations of the Smithsonian Institution by resolution of the Board of Regents, which is repeated every year."

This had reference to his authority to approve the contract (Record, 61); but that has no relevancy to the sanction of the annulment. It was the Superintendant's duty to have the contract properly approved, not ours. If it never was properly approved, it may be a void contract; or we may have waived the proper approval; but *we never waived proper sanction of the alleged annulment.*

"A building contract provided that all of the work should be done to the satisfaction and under the direction of architect, and that his certificate should be essential to a payment,

and it made him the sole arbiter as to regularity, propriety and value of the work. In an action to recover the balance due, it appeared that the final certificates were signed by the *assistant* of the architect, who testified that he never authorized the assistant to sign any certificate. *Held,* that in the absence of evidence that the condition had been waived by the defendant, a judgment in plaintiff's favor should be reversed."

"The fact that to defendant's knowledge the architect did but little, if any, supervision of the work, and that payments were made on the assistant's certificate, was no waiver of his right to the final completion of the contract according to his terms, and insufficient to warrant a finding of fact that defendant acquiesced in or waived the final certificate by the architect himself."

McEntyre vs. Tucker, 5 Misc. Reps. 228 (New York).

This witness testified that his authority to approve contracts came from Acts of Congress which do not exist and from documents and resolutions which, if they do exist and are relevant, should have been produced.

The Secretary, who had been in office only since February 1, 1907, was permitted to testify that he derived his authority to *approve* the annulment from some "Acts" which do not exist and general custom and practice since 1856.

Fourth and Fifth Bills of Exceptions, and Ninth and Tenth Assignments of Errors, Record, 81, 82 and 83.

Besides, their customs and practices have nothing to do with this case. The function given to the Regents in this contract is not statutory; it derives its life from the contract, and not from the statute. The statute merely identifies the Regents. A certain thing, it is agreed, shall be done by the

Regents; and the Act of Congress tells us who the Regents are. The power is plainly and personally imposed by the terms of the contract, and no matter how much they may "loaf on" their statutory duties, no matter what their practice is in this regard, we have only agreed that this function mentioned in the contract shall be exercised by the Regents. Thus far and no further have we agreed to be bound.

On the other hand, it can hardly be claimed that an alleged custom or practice, which the Court allowed this witness to testify to, can be allowed to change plain provisions of the Acts of Congress applicable to the duties of the Secretary, who is not mentioned in the contract.

It is very clear that the contract in this case, which has nothing to do with practices or customs, placed the power to sanction with the Regents, and not with a subordinate employee. We were bound by the terms of the contract, and not by any unknown practice.

The wisdom of the law declaring against this class of testimony is manifest from the disparity in the evidence. But the "sanction of the Regents" is personal and quasi judicial, and can no more be delegated than the *judgment* of the Superintendent.

The Superintendent was permitted to testify that the Secretary "represented the authorities about the whole matter while it was in progress."

6th and 7th Bills of Exceptions, and 12th and 13th Assts. of Errors, Record, 121 and 122.

What opportunity for justice would any party have in the face of testimony of this character?

This i all the evidence upon which the Court ruled that the "Secretary, acting for the Regents, gave his consent to the annulment in the proper manner," as though it were a mere matter of formal ministerial detail. Even the Secretary made no investigation. His approval was given at once in a merely formal manner.

But this was not a merely formal matter of detail; the Superintendent had the power to annul only "with the sanction of the Regents of the Smithsonian Institution;" their judgment, their quasi-judicial discretion, was the only safeguard between us and the absolute judgment of the Superintendent; and small officials have been known to become arbitrary after long years of faithful service.

No argument or citations are necessary; the contract speaks for itself; the words mean what they clearly import, —either that or nothing; and we submit that the Court erred in granting the aforesaid instructions and in refusing the defendants' 15th, 16th, 17th and 20th prayers. (Record, 911 and 913.)

Our right to insist upon the plain and fair terms of our contract, that the Superintendent "shall have power" only "with the sanction of the Regents of the Smithsonian Institution to annul this contract," instead of a merely formal and vacuous act of a subordinate,—is all the stronger because the building was being constructed for the Regents themselves. The Regents would have protected us against the arbitrary conduct of the Superintendent and the empty formalism of the Secretary.

Respectfully submitted.

George R. Gaither,
John B. A. Wheltle,
Burdette B. Webster,
Charles F. Harley,
Counsel for Plaintiffs in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

FRANK F. GRAHAM AND THE TITLE GUARANTY AND SURETY COMPANY, plaintiffs in error,
v.
THE UNITED STATES.
No. 76.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This action was brought in the Circuit Court of the United States for the District of Maryland by the United States against the contractor, Graham, and his surety, the Title Guaranty & Surety Company, to recover damages accruing from the breach of a contract "to transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry

at Bethel, Vermont, required for that portion of the South pavilion above the first floor level of the said building for the National Museum, in Washington, District of Columbia, described as part 'C' in the said specifications, and do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions " (R. 1–2, 57).

The contractor filed 14 pleas (R. 6–16) and the surety 15 (R. 17–28). Of these latter the first 14 were similar to those filed by the contractor, and the 15th charged material alterations of the contract without the assent of the surety.

The trial lasted some 20 days, at the end of which time the jury found a verdict for the plaintiff for the penalty of the bond, to wit, $50,000. The defendants took 39 separate bills of exception (R. 874), submitted 26 special prayers for instructions (R. 855, 866) and as plaintiffs in error in this court present 48 assignments of error (R. 938–971). The record apparently contains everything which happened during the course of a hotly contested jury trial. The Circuit Court of Appeals for the Fourth Circuit affirmed the judgment in all respects (R. 929; 188 Fed. 651), and it may well be asked how far counsel or this court should now be required to consider those assignments of error which do not raise clear, substantial questions of law but merely represent dissatisfaction

with the rulings of the trial judge from which no prejudice to the plaintiffs could have ensued.

A reading of the record will disclose—

First, that the breach and abandonment of the contract by the contractor Graham was deliberate and without excuse.

Second, that the action taken on behalf of the Government after such breach was in strict accordance with the terms of the contract and the rights of the parties.

Third, that there are no peculiar defenses available to the surety.

Fourth, that in the conduct of the trial no errors were committed which were prejudicial to the plaintiffs in error or either of them.

The multitudinous assignments of error may be most conveniently classified and disposed of with reference to these four propositions.

ARGUMENT.

I.

The breach and abandonment of the contract by the contractor Graham was deliberate and without excuse.

The evidence shows (R. 113, 116, 431, 432, 802, 803) that on the 7th day of March, 1908, without previous warning, Graham paid off and discharged his workmen, closed his yard, and abandoned his work on the contract. When information of this fact reached Bernard R. Green, Superintendent of Construction, on the part of the Gov-

ernment, he wrote under date of March 11, 1908 (R. 113), expressing his surprise and received in reply from the attorney for Mr. Graham a letter dated March 14, 1908, stating (R. 116) that his "client had stopped work" on the contract, and that this act was "necessary for his financial welfare in view of the fact of the damage he has sustained, which said damage was not occasioned by any fault or neglect on his part, by reason of the manner in which this matter has been gone on with on the part of the Government, and their agents in the matter."

Graham then bestirred himself to invent excuses, and has presented in the courts below and in this court the following:

(1) An alleged delay on the part of the Government in furnishing the granite.

(2) An alleged failure on the part of the Government to furnish "net dimension blocks" as required by the contract (R. 41, par. 5).

(3) An alleged failure on the part of the Government to make payment as required by the contract.

(1) The alleged delay on the part of the Government in furnishing the granite.

The contract provided (R. 41, 57, 58) that—

> The necessary Bethel granite stock, in net dimension blocks, is to be furnished to the Government by the present contractor, free on board cars at the quarry in Bethel, ready

> for the contractor for the cutting of the granite to transport it to his cutting yards for that purpose * * *.
>
> The party of the second part shall transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry at Bethel, Vermont, * * *.

There was evidence tending to show that at the outset there was delay in getting granite to the contractor. It was the duty of the contractor to furnish setting plans for the guidance of the quarrymen in taking out the stone, and it is contended on the part of the Government that the contractor was unduly slow in furnishing these plans, and on the part of the contractor that the Government was not prompt in approving them. But however this may be, it is undisputed (R. 580, 581, 843, 844) that from February, 1907, on, there was always more stone at the quarry ready to be loaded than there were cars to receive it, and that the cause of the delay was a shortage of car supply (R. 843, 844). This condition of affairs it was not within the power of the United States to remedy; nor was it its duty to do so.

The obligation of the United States was merely to furnish the granite "without unnecessary delay, and without charge, *free on board cars* at the quarry at Bethel, Vermont." These words of the contract, in the absence of any agreement to the

contrary, imposed upon Graham alone the duty of furnishing the cars.

62 L. R. A., 795, 797; note.
Hocking v. *Hamilton,* 158 Pa. St. 107.
Baltimore etc. Co. v. *Steel Rail etc. Co.,* 123 Fed. 655.
Evanston etc. Co. v. *Castner,* 133 Fed. 409.
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This is according to common sense, since the contractor, having to pay the freight, was primarily interested in the route by which the stone should be shipped and likewise in the times and quantities of the shipments.

In the present case, so far from there being any agreement contrary to the general rule, it appears (R. 645) that on February 20, 1907, the Superintendent of Construction wrote to Graham to the effect that it was his duty to attend to the supply of cars, and, so far as the record shows, Graham never dissented from that view.

These same considerations dispose of the claim that later on shipments were unduly rushed, since this matter also it was Graham's duty to regulate.

However, the trial judge did not charge the jury that there was an absolute duty on Graham to furnish cars, but that "if the government, by its agents, made all reasonable efforts to see that cars were furnished," then Graham was not justified in abandoning the contract (R. 869). This charge, it is submitted, was even more than the defendants

could ask, and the jury by its verdict must have found that the Government did make such reasonable efforts.

Still further, assuming, for argument's sake, that delay on the part of the Government in furnishing the stone would constitute a breach of a dependent covenant which would entitle Graham to refuse further performance, it is undisputed that, with a full knowledge of such delay, he continued his work on the contract without any attempt to rescind, and on February 10, 1908 (R. 346, 347), he wrote a letter to the Superintendent declaring his intention to devote his entire yard to the Museum work until he saw the job about completed. Such action, as the Court of Appeals held, clearly constituted a waiver of any right to rescind.

(2) The alleged failure on the part of the Government to furnish "net dimension blocks," as required by the contract (R. 41, par. 5).

A great deal of evidence was submitted to the jury as to the meaning of this term, and some differences developed on the subject between the witnesses for the plaintiff and those for the defendants. The defendant Graham worked himself up to the point of stating (R. 790):

> In net dimension it is perfect. It is either a sawed block or a cut block. Everybody knows what a net dimension block is; it is either cut or sawed.

This in the face of the contract which called for the delivery of "net dimension blocks" to be *cut* by him.

He stood alone in this definition and nothing was further from his own mind when the contract was signed. After stating that he was satisfied if the stone was an inch or two, or even three inches, over (R. 810), and after writing to Green in February, 1907, that "as a rule rough stone never runs more than an average of 225 lbs. to the foot" (R. 818), he expounds the reason for his change of front in this language (R. 819):

> I said, these are going to be the best patterns that have ever come into Baltimore when I saw that in there; but *since* I found out that a net dimension block means a *perfect* block and I am trying to hold you *now* to that specification. [Italics ours.]

The question was preeminently one for the jury and was submitted to it by the court in the following language of the general charge (R. 869):

> Now, it is for you to say whether on a fair average the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulalation was understood by the parties to the contract.

This last remark of the trial judge was based on the general conduct of the contractor in accepting as net dimension blocks the stone sent to him and

using it in carrying out the contract, and also on his specific testimony (R. 810, 818–820) as to his own understanding in the matter.

While the trial judge very properly called the jury's attention to certain specific evidence which seemed to him to have an important bearing on the question (R. 869), he nevertheless stated this evidence with entire accuracy and left the whole question to the jury. In this respect the charge is not open to objection. *Rucker* v. *Wheeler,* 127 U. S. 85, 93.

It is suggested that the ordinary rule of reading an ambiguous contract in the light of the interpretation placed upon it by the parties themselves, does not prevail in this action because one of the defendants is a surety and the action is on the bond. No authority is cited for this somewhat novel doctrine. Since the bond is given to insure a faithful performance of the contract, no reason is perceived why the ordinary rules for the interpretation of the contract may not be used to fix in turn the obligation of the bond.

(3) The alleged failure on the part of the Government to make payment as required by the contract.

When asked whether he had not abandoned the contract because of mistake on his part in estimating the amount of stone to be cut, Graham answered: " No, sir; I did not. I stopped because I could not get any money " (R. 810).

This is quite as flimsy as the other excuses put forward. On March 6, 1908, the day before his abandonment, he was paid $2,700, making $59,400 paid to that time (R. 120, 153, 635). These payments, made to Graham, were based upon an estimated allowance of $2.50 per cubic foot, and had they been continued at the same rate throughout the life of the contract Graham would have been largely overpaid (R. 658). Neither as to quantity or time of payment does the record disclose the slightest ground for complaint on his part. (See Record, p. 53, par. 41, for contract provisions with reference to payment.)

II.

The action taken on behalf of the Government after the breach of the contract was in strict accordance with the terms of the contract and the rights of the parties.

(1) The declaration of annulment.

The contract (R. 57, 58, par. 4) provided that "if the contractor should in the judgment of the Superintendent of Construction fail to prosecute the work diligently the Superintendent should have the power, *with the sanction of the Regents of the Smithsonian Institution,* to annul the contract."

Graham, as we have said, entirely abandoned the work on March 7, 1908, and by his counsel so notified the Superintendent of Construction on March 14. Thereupon, on March 18, 1908, the Superintendent of Construction wrote a letter to the Secre-

tary of the Smithsonian Institution (R. 75) recommending an annulment of the contract, and on the same date the Secretary wrote authorizing the annulment (R. 77), which fact was duly communicated to the contractor and his surety (R. 76).

It is now insisted by the plaintiffs in error that the sanction of the Regents of the Smithsonian Institution to this annulment was never procured, and that therefore the attempted annulment is inoperative. The answer to this suggestion is obvious.

(a) *No formal annulment was necessary.* When Graham wholly abandoned the contract, as it is clear he did, the United States immediately acquired the right to treat the breach as absolute and to hold him without more saying for any damages accruing to it, the measure of such damages being the increased cost of completing the work. The term "annulment" in such a contract means to refuse to proceed further with the contractor. *United States* v. *O'Brien,* 220 U. S. 321, 328. And, of course, the United States could not proceed further if the contractor himself refused to go on. The notice of annulment, as said by this court in *United States* v. *McMullen* 222 U. S. 460, 471, "was merely a ceremony to mark the point of default as a preliminary to employing some one else." Since, therefore, the annulment was a mere formality, it is wholly immaterial whether the Regents sanctioned it or not.

(b) *But the evidence in the record clearly shows that the Secretary was the agent of the Regents in such matters as the approval and annulment of contracts, and the sanction given by him was pro hac vice the sanction of the Regents.*

The Smithsonian Institution is a corporation (R. S., 5579), of which the Regents, consisting of the Vice President of the United States, the Chief Justice of the United States, certain members of the Senate and House and others, are virtually directors (R. S., 5580).

The Secretary has charge of the buildings and property of the Institution and keeps the records of the Board (R. S., 5583) and its accounts (Act Oct. 2, 1888, 25 Stat. 505, 529). Moreover, by long usage the Secretary is actually the director of the Institution (R. 79). Apparently he is referred to as such in acts of Congress (Act July 7, 1884, 23 Stat. 194, 214); and by resolution of the Board (R. 80) and by custom and practice (R. 83), approves of contracts and other matters relating to the construction of buildings. Moreover, the plans for the very building now in question were to be approved by him (Act June 28, 1902, c. 1301, 32 Stat. 419, 440).

An agency may be proved by acts *in pais* as well as by proof of direct authority.

Bank of United States v. *Dandridge*, 12 Wheat. 64, 70, 83.

Bronson's Exr. v. *Chappel*, 12 Wall. 681.

Mining Co. v. *Anglo-Californian Bank,* 104 U. S. 192.

It is not to be supposed that Congress intended the Regents of the Institution, burdened as they are with public duties of surpassing moment, to charge themselves with such details as the approval or annulment of individual contracts for builders supplies.

(c) *The clause in the contract calling for the sanction of the Regents upon its annulment is itself void.*

The Act of Congress of March 3, 1903, 32 Stat. 1083, 1102, conferred upon Bernard R. Green alone the right to make the contracts for the construction of this building. As it would be beyond him to increase the powers conferred upon him by this act, it is equally so, we submit, to lessen them by sharing any portion of these powers with another. Of the limitations which bound him in this respect plaintiffs in error had full notice. *Whiteside* v. *United States,* 93 U. S. 247, 256.

III.

There are no peculiar defenses available to the surety.

Two such special defenses are suggested; first, extension by the Superintendent of the time for completion, and, second, material alterations made by the Superintendent and contractor without the knowledge of the surety. These are equally unsubstantial.

(1) Extension of time.

The contract was to be completed October 1, 1907 (R. 42). It is objected by the surety (R. 26, 27, 314) that this time limit was waived without its assent. Paragraph 5 of the contract provided (R. 59) that the Government instead of annulling the contract for failure to complete within the time stipulated might "waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part." This part of the contract was of course assented to by the surety, and the case therefore is governed completely by *United States* v. *McMullen, supra;* and this applies equally to the argument that the waiver was not by formal agreement.

(2) Material alterations.

The contract by paragraph 6 (R. 59, 60) provided that if changes in the project should be found advantageous such changes

> * * * must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Regents of the Smithsonian Institution: *Provided,* That no payments shall be made unless such supplemental or modified agree-

ment was signed and approved before the obligation arising from such modification was incurred.

Certain extra work was found advantageous, and on February 20, 1908 (R. 236, 237), Graham wrote to the Superintendent enclosing a detailed bill of these extras. On February 29 the Superintendent answered the letter (R. 240), stating that the amount claimed was too large according to the Government's figures, and offering to adjust the matter by the payment of $4,000, which amount was accepted by Graham (R. 241), and allowed him on account. The Surety Company now contends that this was a material alteration of the contract which released it from its obligation on the bond. But the difficulty with its claim is this: Either these alterations were agreed upon in the manner provided in paragraph 6 of the contract, or they were not. If they were, then the surety, having assented to such alterations in advance, can not object. *United States* v. *McMullen, supra.* If they were not, then no valid agreement for alterations was ever made at all, no claim ever existed in favor of Graham against the United States on account of them (see par. 7 of the contract, R. 60), and the allowance of $4,000 to Graham was a mere gift by the Government, of which the surety can not complain.

Moreover, no damage whatever accrued to the Surety Company by reason of Graham's doing this extra work, and being paid for it. If a formal

agreement had been entered into for the extras, the surety could not have objected, and evidently the provision as to a formal agreement was inserted for the benefit of the United States, and the lack of such an agreement where the work is actually done and paid for could not prejudice the surety. The rule *strictissimi juris* should not be applied to these professional bonding companies to release them from their just obligations where slight changes have been made in the contract, not injuring them in the least.

> *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 426.
>
> *Hill* v. *American Surety Co.*, 200 U. S. 197, 202.
>
> *Atlantic Trust etc. Co.* v. *Laurinburg*, 163 Fed. 690, 695, 696.

In the latter case the Court of Appeals for the Fourth Circuit said:

> The very reason for the existence of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and expect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses, by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts pre-

pared by themselves. It is right, therefore, to say to them that they must show injury done to them before they can ask to be relieved from contracts which they clamor to execute. * * *

IV.

In the conduct of the trial no errors were committed which were prejudicial to plaintiffs in error or either of them.

Many of the assignments of error, which have to do with the conduct of the trial, the admission or exclusion of evidence, and the charge of the court to the jury, are so plainly captious that they need no discussion. The following may be noticed:

(1) The letter-heads of the Surety Company were properly admitted, and counsel's comment upon them was not prejudicial error.

This plaintiffs in error are pleased to call the "million dollar argument." The Government, in order to show knowledge on the part of the Surety Company of Graham's default, and that the Company in the face of such knowledge made none of the objections to the Government's claim which are now urged, offered in evidence certain letters passing between the Superintendent of Construction and the company's attorney (R. 125, 131). The letters of the latter were written on letter-heads of the company, which stated, *inter alia*, that its capital and surplus was $1,000,000. The United States Attorney in his address to the jury, after reading

this statement, remarked (R. 875): "There is no room for sympathy for the poor defendant in this case."

It is now claimed that the letter-head should not have been admitted and that the remarks of the United States Attorney were of such an unfair character as to form the just basis of an assignment of error in this court. Upon the first point it suffices to say that the letters themselves were admittedly competent and therefore the letter-heads, being a part of the letters, were also competent; or, to quote the language of the Court of Appeals on this subject (188 Fed. 654):

> * * * Nor can we quite see what line can be firmly drawn against the introduction of a letter headed communication which letter head has been promulgated, published, and used by the surety company for no other purpose that we can conceive of than that of furnishing a brief, accurate description of itself, its address, its responsible officers, the nature of its business and its financial ability to conduct such business, and it is far from clear to us how such defendant could be prejudiced by this its own act, especially before a jury charged, as in this case, by the court that:
>
> "The same principles of right and justice which prevail between individuals should control the construction and carrying out of contracts between the government and those who contract with it or its agents."

As to the remarks of the United States Attorney, it may be observed that the statements of opposing counsel to which they were undoubtedly an answer, are not in the record, and it does not appear whether or not Graham's insolvency had been held up to the jury to arouse its sympathy. But in the face of the case made upon the record it requires a fertile imagination to conceive that these remarks influenced the jury in the slightest. The matter was one clearly within the discretion of the trial judge and is covered by the remarks quoted above from his general charge, which were preceded by his further statement (R. 868) that "it is not a case for sentimental considerations of any kind."

(2) The measure of damages.

Some point is made by the plaintiffs in error as to the granting of defendant in error's prayer on this subject (R. 904; brief p. 76), but the objection is unsubstantial in the extreme. It is submitted that the prayer fairly conforms to the language of this court in *United States* v. *McMullen*, supra, saying that:

> * * * The cost to the United States was the least for which it could get the work done under the conditions upon which the Government was bound to contract, and must be assumed to have been reasonable in the absence of any evidence to the contrary.

In the case at bar there was abundant evidence of the exact cost to the Government, and no evidence at all contradicting it.

(3) The special charges asked by plaintiffs in error were properly refused.

The plaintiffs in error submitted to the trial judge twenty-six special prayers for instructions (R. 855–866), all of which were refused. As said by the Circuit Court of Appeals (188 Fed. 654):

> * * * The very number of these was calculated to confuse and mislead the jury, and a number were not at all warranted by the evidence. The court, we think, very wisely, concluded to give a general charge touching the matters in controversy, and, so far as we can see, fairly and impartially submitted to the jury the determination of the facts in dispute.

It is settled that a Federal judge is not obliged to give such special charges, but may present the matter to the jury in his own way, provided he state the law correctly. *Continental Improvement Co. v. Stead*, 95 U. S. 161, 166. The objections of plaintiffs in error to the general charge are set out in the record, pp. 870–874. In the main they consist of the points already discussed herein, namely, the annulment of the contract, the duty of the Government to furnish cars, and the meaning of the term "net dimension blocks." The court took from the jury the question of delay on the part of the Government in furnishing the stone, both because there was no evidence upon the subject, the delay being admittedly due to a lack of cars, and also because

Graham had waived his right to complain, if any he had, by continuing work on the contract long after stone had begun to arrive in sufficient quantities. The Circuit Court of Appeals correctly describes the general charge (R. 867) as fair and impartial.

CONCLUSION.

In *Deming* v. *Carlisle Packing Company*, 226 U. S. 102, 106, this court said:

> * * * That the substantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is in our opinion indubitable.

It is respectfully submitted that in the case at bar the inordinate length of the record, the frivolity of most of the matters assigned as error, *e. g.*, the passing remarks of the judge at the trial, the reference in the charge to certain pleas by number rather than by topic, the attack made upon the good faith of the Superintendent in declaring the contract at an end—and the lack of merit in all—must lead the mind to the same conclusion. It is impossible to read the record and the brief of plaintiffs in error without being convinced that while the effort is to raise all possible points in the dim hope that one perchance may prove a plank in the shipwreck, yet the cardinal purpose of the prosecution of this writ of error is delay.

The judgment below should be affirmed, wi
damages at 10 per cent. in accordance with the pr
visions of rule 23, paragraph 2, of this court.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1913.

GRAHAM AND THE TITLE GUARANTY AND SURETY COMPANY *v.* UNITED STATES OF AMERICA.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 76. Argued November 13, 14, 1913.—Decided December 8, 1913.

Where the contractor refuses to go on with the work there is no question of revision of judgment of an officer annulling the contract, and a right of action accrues to the Government without need of any useless ceremony of approval by the superior officer or board. *United States* v. *McMullen*, 222 U. S. 460, distinguished.

In this case, as the bond in terms contemplated an extension of time and the contract provided for modifications, the surety was not discharged by waiver of time limit or for modifications without its express consent.

Under a contract that the Government would furnish the contractor with granite blocks free on board cars at the quarry, he to transport them, *held* that the contractor was to furnish the cars and was responsible for delay in that respect.

In Federal courts the judge and jury are assumed to be competent to play their respective parts; and *held* that the charge to the jury in this case as to the meaning of the phrase "net dimension blocks" was adequate and fair.

This court will not upset a verdict upon the speculation that the jury did not do their duty and follow the instructions of the court; the fact that the attention of the jury was called by counsel for the Government to the statement on the letter-head of the surety company defendant that its capital was $1,000,000, *held* not to have been prejudicial.

An instruction that the Government was entitled to recover, in case of breach found, an amount, not exceeding the penalty of the bond, equal to the difference between the reasonable and necessary cost to it for transporting, cutting and delivering the granite mentioned in the case and the amount specified in the contract, *held* to have referred simply to the granite actually in controversy; and there

being evidence in the case to warrant the finding, and as the measure followed the contract, a verdict for the amount was correct.
188 Fed. Rep. 651; 110 C. C. A. 465, affirmed.

THE facts, which involve the validity of a judgment obtained by the United States against a contractor and surety for failure to perform, are stated in the opinion.

Mr. Charles F. Harley and *Mr. George R. Gaither*, with whom *Mr. John B. A. Wheltle* and *Mr. Burdette B. Webster* were on the brief, for plaintiffs in error.

The Solicitor General for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon a bond against a contractor and his surety, for breach of a contract made under the act of March 3, 1903, c. 1007, 32 Stat. 1083, 1102, with Green, Superintendent of Construction, acting under the direction of the Regents of the Smithsonian Institution for the United States, party of the first part, which the bond was given to secure. The contractor, Graham, agreed to "transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry at Bethel, Vermont, required for" a part of the National Museum in Washington described in the specifications, "and to do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions," for a gross sum. In case of failure to prosecute the work diligently in the judgment of the Superintendent of Construction, Green or his successor was given power, 'with the sanction of the Regents of the Smithsonian Institution, to annul' the contract by notice in

writing, whereupon payments under the contract were to cease, &c., and the United States was given the right to recover from Graham any excess over the contract price expended for completing the contract, which it was authorized to proceed to do. There were provisions for an extension of time by the Superintendent, for written modifications of the contract as to the character or quantity of the labor or material, and for payment of ninety per cent. as the progress of the work might warrant. The bond was for the performance of the contract according to its true intent and during any period of extension granted by the United States.

On March 7, 1908, after the time fixed for the completion of the work, Graham discharged his workmen and stopped work, the contract not having been performed. On March 11, the Superintendent wrote to him saying that he had heard that Graham apparently had stopped work indefinitely, and asking for immediate correct information. On the 14th Graham's lawyer answered that Graham had stopped work; that the step was necessary for his financial welfare in view of the damage that he had sustained through the Government's conduct, and that "if this matter can be in any way amicably adjusted" he would be glad to do anything fair. On the 16th the Superintendent replied that if he received no immediate assurance that the work was to be resumed promptly he must proceed to annul the contract; and on the 18th notified Graham that the contract was annulled with the sanction of the Regents of the Smithsonian Institution. To this Graham's lawyer rejoined that they could not concede any default, that the Government alone was to blame, but that they were willing to do what was fair, and to let the Government use their plant if the damage sustained could be adjusted. The Superintendent had written on the 18th to the Secretary of the Board of Regents recommending the so-called annulment and notice

to the contractor and his surety, and had received his approval expressed to be on behalf of the Board of Regents. Afterwards the United States completed the work. There was a long trial which resulted in a verdict and judgment for the plaintiff for the penalty of the bond, $50,000, subject to exceptions. The judgment was affirmed by the Circuit Court of Appeals. 188 Fed. Rep. 651; 110 C. C. A. 465.

Before considering the excuses alleged by Graham we will dispose of a preliminary objection that the suit cannot be maintained because the Secretary of the Board of Regents did not consult the Board before undertaking to sanction the 'annulment' of the contract. It is unnecessary to pass upon the argument that under the statute the Board could have no voice, and that by custom and practice, as well as by necessity in view of the constitution of the Board, the Secretary represented it in matters like this. The provision as to annulment, construed in *United States* v. *McMullen*, 222 U. S. 460, 471 and cases cited, referred to cases where there was a failure to prosecute the work diligently in the judgment of the Secretary and allowed a revision of that judgment in cases of that sort, before the United States should decline to proceed further and complete the work by other means. But when Graham refused to go on, there was no question of judgment to be revised but a plain breach of the contract unless the refusal was justified, and a right of action accrued without the need of a ceremony that would have had no meaning or use. The letters from March 7 to March 18, 1908, appear to us to show a clear refusal by Graham to do any further work. The expressions as to adjustment suggest nothing but a compromise of mutual claims, to be followed by the Government's, not Graham's, use of Graham's plant.

Another objection not going to the merits of Graham's case is that the surety was discharged by a waiver of the

original time limit without its assent, and by Graham's being called on for some extra work, due to a slight enlargement of the diameter of the dome, for which he was paid. The bond in terms contemplated an extension of time as possible and the contract provided, as we have said, for a waiver of the time limit and for written modifications. The modifications were exhibited in letters, but perhaps it is unnecessary to consider how far a surety whose undertaking extends to modifications of the principal contract is concerned with the form in which they are made. The surety was not discharged. *United States* v. *McMullen*, 222 U. S. 460, 468, 469.

The only question of substance is whether Graham's refusal to finish the work was justified or excused by the conduct of the other party. The first and only serious matter of complaint on his part was delay in furnishing him granite. The undisputed testimony is that this delay was due to their being unable to get cars at the quarry to take the stone, and so under the instructions the jury must have found, so that the responsibility for it depends upon who was bound to furnish the cars. By the contract the Government was to furnish the granite free on board the cars at the quarry, and Graham agreed to transport it from that place. On such an undertaking, as Graham was to do the transporting and moreover was made responsible for safe delivery on the site of the Museum building, and as the railroad would be his bailee, he naturally would be held to furnish the cars. No different conclusion seems to us to follow from the language of the preliminary description and conditions. These recite that "The necessary Bethel granite stock, in net dimension blocks, is to be furnished to the Government by the present contractor, free on board cars at the quarry in Bethel, ready for the contractor for the cutting of the granite to transport it to his cutting yards for that purpose." They go on "Bidders for the Bethel granite work

will therefore bid on the basis and understanding that the granite, in net dimension blocks, one block for each separate pattern, will be furnished to them without unnecessary delay and without charge, free on board cars at the quarry at Bethel, Vermont." The first passage does not mean that because the quarry man was to furnish the granite free on board and ready for transportation the quarry man was to furnish the cars. It may mean that as between him and the Government the Government was bound to do it, but, by the same reasoning, the second passage means that bidders were invited to step into the Government's shoes and assume a like obligation towards it, as by the agreement when made Graham did. It follows that he cannot charge the United States with delay due to lack of cars. Furthermore, in a letter of February 10, 1908, when the delay had ceased, he wrote that the work was nearly finished and that he intended to devote his whole yard to it until it should be about completed. This is wholly irreconcilable with the defence that a month later he abandoned the work because of the delay.

The next excuse put forward is that the granite was not furnished in 'net dimension blocks.' There was contradictory evidence as to the meaning of the phrase, Graham contending, in the face of his contract to cut, that it meant perfect blocks. But he admitted that he did not have that understanding when he contracted and, although on February 14, 1907, he complained of the size, in the letter just mentioned of February 10, 1908, he wrote that the work 'has had to be cut and shipped, but it is now nearly finished and I intend to devote my entire yard to Museum work, until I see the job about completed.' The judge left it to the jury 'whether on a fair average the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulation was understood by the parties to the contract.'

He added, 'if you find that in the latter part of February and the early part of March the stone in point of its dimensions and roughness did not comply with the contract, . . . Graham could not be held to the further performance of his contract, and your verdict should be for the defendants.' The reference to February and March did not import a limitation of time, but simply a reference to the period as to which the judge understood that there was special complaint. No attention was called to the matter as it should have been if any misunderstanding was feared. The charge on the point was adequate and fair. It is objected that the judge called the jury's attention to Graham's testimony concerning his expectation when he contracted. The judge had a right to do more than that if he left the decision to them. Universal distrust creates universal incompetence. In the courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in the country in which the modern jury trial had its birth. *Rucker* v. *Wheeler*, 127 U. S. 85.

The ground on which Graham testified that he stopped work was that he could not get any money, but there seems to be no evidence that the Government failed in its obligations as to payment and this point is not one of those most pressed. We have examined the places in the record referred to by the defendants and think it enough to say that we discover no error of which they can complain.

Much emphasis was laid in the argument on what seem to us meticulous objections to every detail in the conduct of the trial. One that was dwelt upon was that, in putting in a letter from the surety showing notice to it of Graham's default and the position taken by it, the counsel was allowed to read the letter head, which contained the words 'Capital and Surplus over $1,000,000,' as well as the letter itself (which last was not objected to), and that in argument the counsel for the Government said 'There is no

room for sympathy for the poor defendant in this case.' The document went in as a whole, properly enough, and the judge charged the jury that it was 'not a case for sentimental considerations of any kind' with more in the same direction. It would be absurd to upset a verdict upon a speculation that the jury did not do their duty and follow the instructions of the court. As to various remarks made by the judge in the course of the trial, it is enough to refer to what we have said already as to his power, and that we discover nothing that could have created a prejudice against the defendants or have been open to objection even if he had been more strictly tied down by law than he was.

We find no error on the question of damages. The judge instructed the jury that the plaintiff was entitled to recover, of course not exceeding the penalty of the bond, the difference between 'the reasonable and necessary cost to the plaintiff for transporting, cutting and delivering the granite mentioned in this case . . . and the amount specified in the contract' to be paid to Graham. There was some cavil at the phrase 'granite mentioned in this case,' but obviously it meant the granite in controversy. There was evidence warranting a finding, and the measure followed the contract and was correct. *United States* v. *McMullen*, 222 U. S. 460, 471. A superfluous number of prayers was submitted and exceptions were taken at every step. We deem it enough to say in regard to them all that the instructions to the jury were fair, the rulings on the questions in the case correct, and that nothing appears that would warrant us in ordering the case to be retried.

Judgment affirmed.

THE CHIEF JUSTICE took no part in the decision of this case.